Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

ONOFRE SERNA
PETITIONER

versus

CITY OF SAN ANTONIO AND AL PHILIPPUS
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a court's inquiry into a police officer's claim of retaliation for the exercise of free speech should focus on the chilling effect of the retaliatory action instead of on whether it was an adverse employment action.

(2) Whether the Fifth Circuit applied an incorrect standard of review and therefore analyzed the evidence under a standard which conflicts with this Court's decision in ***Reeves v. Sanderson Plumbing Prods.*** 530 U.S. 133 (2000).

(3) Whether the Fifth Circuit's improper credibility determinations, weighing, and credence of contradicted evidence and evidence from interested witnesses is in conflict with this Court's decision in ***Reeves v. Sanderson Plumbing Prods.*** 530 U.S. 133 (2000).

CERTIFICATE OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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JURISDICTION

(1) This action was initially filed in the 37th Judicial District Court in San Antonio, Bexar County, Texas on August 30, 1996 but then removed by defendants to federal court on February 26, 1998. The lower court had jurisdiction pursuant to 28 U.S.C. § 1331 and 1343 (4) and plaintiffs' claims are cognizable pursuant to 42 U.S.C. § 1983 and U.S.C. § 1681 *et seq* for First Amendment violations of freedom of speech and freedom of association under the Constitution of the United States and freedom of association under the Texas Constitution. Ancillary state claims are cognizable under the Texas Whistleblower Protection Act.

(2) Appellate jurisdiction was asserted pursuant to 28 U. S. C. Section 1291 because the order and judgment appealed from was the final decision of a United States District Court entered on June 11, 1999 and subsequently amended July 9, 1999 pursuant to Rule 3, Federal Rules of Appellate Procedure.

(3) The Supreme Court has jurisdiction because the decision of the United States Court of Appeals for the Fifth Circuit is in conflict with prior decisions of this Court and of other Circuit Courts. The Fifth Circuit in the instant case entered its final judgment on March 26, 2001. Appellee/petitioner Onofre Serna filed his

Petition for Rehearing *En Banc* on April 9, 2001 and it was denied May 3, 2001. Accordingly, this Petition for writ of certiorari is timely. The jurisdiction of this Court is conferred under 28 U.S.C. § 1254 (1) and Rule 10.1(a), 28 U.S.C. Rules of the Supreme Court.

(4) Petitioners do not expect a cross petition for writ of certiorari to be filed pursuant to Rule 12.3.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

United States Constitution Amendment I

United States Code, Chapter 42, Section 1983

United States Code, Chapter 42, Section 1681

Texas Government Code Annotated §554.002. Protections For Reporting Violations of Law (Whistleblower Act)

STATEMENT OF THE FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

A. Nature of the Case and Disposition Below

1. Onofre Serna, a police officer in the City of San Antonio, Texas, sued the City of San Antonio and its Chief of Police, Al Philippus, for violating his First Amendment rights to freedom of speech and association under 42 U.S.C. § 1983 and for violations of the Texas Whistleblower Protection Act, TEX. GOV'T CODE ANN. § 554.001 et seq. (Vernon Supp. 2000).

2. After a full trial on the merits and nine days of testimony the trier of fact found:

a) "from a preponderance of the evidence that Onofre Serna was transferred in retaliation for making a good faith report of a violation of law to an appropriate law enforcement authority or agent[;]" (Verdict - Jury Question 1.)

b) "that Onofre Serna's freedom of speech was violated by the Defendants[;]" (Verdict - Jury Question 3.) and,

c) "by a preponderance of the evidence that the Defendants violated Onofre Serna's freedom of association rights[.]" Verdict - Jury Question 8.

3. Accordingly, the district court entered a judgment for Serna on both his § 1983 claims and his state Whistleblower claim and awarded him $500,000.00 (which was reduced by the trial court to

$475,000.00) in damages.

4. A panel of the Fifth Circuit thereafter found that although the respondents' motion for judgment as a matter of law was untimely, the court could review the judgment and then reversed the judgment of the district court and rendered judgment for the City and Chief Philippus because it determined "the evidence at trial was insufficient for a reasonable jury to conclude that Serna suffered an adverse employment action as a result of his transfer."

B. Statement of Facts Relevant to Issues Presented for Review

5. This case involves the Fifth Circuit's judicial sanction of civil rights violations by the Downtown Foot and Bike Patrol Unit of the San Antonio Police Department against citizens of these United States. This case highlights a decision of a United States court of appeals which is in conflict with the decisions of other United States courts of appeals as well as is in direct conflict with prior decisions of this Court.

6. This case is the result of illegal orders given by Lt. Griffin to the police officers in the Downtown Foot and Bike Patrol Unit to run the homeless and ethnic or minority teenagers out of the downtown riverwalk area. Onofre Serna, an officer in the Foot and Bike Unit, reported these illegal unconstitutional orders to the proper authorities within the department.

7. The Downtown Foot and Bike Patrol Unit ("DFU") was a specialized police unit that patrolled the downtown riverwalk area of San Antonio on foot and bicycles. Lt. Griffin ordered officers under his command to "start getting rid of all the kids that were hanging around downtown" "irrespective of whether they were violating the law" Griffin ordered the homeless to be treated the same way: "we needed to get rid of them" "whether or not they were violating any law." "He said we need to move all these kids out of the downtown area and all the homeless people out." With respect to the teenagers, "we were told to confiscate the property, bandanas, baseball caps, shirts, you know" without probable cause or suspicion of a crime.

8. In contrast, the officers were told to leave the tourists and business people who were doing the same things as the teenagers and homeless alone. The officers were ordered to make sweeps for public intoxication in the minority bars, but to leave the tourist bars, such as Planet Hollywood and the Hard Rock Café, alone. Lt. Griffin ordered: "We need to go down to Gloria's and the Aztec Bar and get all these ***wetbacks*** out of here, move them out, get all the ***Mexicans***, the ones that are drunk and arrest them for whatever and get them out."

9. Griffin instructed officers to "get in the kids faces, make something happen to get them out of downtown." Griffin ordered officers to detain people and check them for warrants and search them without

any reasonable suspicion or probable cause of criminal activity or of any danger to the officer or others. After a while, "we were told by Lieutenant Griffin that...if the tickets would not make them leave, then instead of giving them tickets, to go ahead and arrest them and throw them in jail."

10. Griffin's response to the officers who questioned these orders was "***you can do whatever you got the balls to get away with***!"

11. Testimony about these illegal orders and policies came from many witnesses other than Serna. Serna associated with other officers who believed it necessary to bring Lt. Griffin's illegal conduct to light. Serna also spoke out in support of the discrimination complaints filed by other officer's and voiced his concerns regarding the racial discrimination directed at Officers Johnson, Vela, Lockamy and Aguilar.

12. Serna reported these illegal orders and policies in one-on-one sessions to his superiors within the unit over a period of years, but nothing changed. Serna next reported the illegal orders and policies at a special July 1995 meeting called by the unit's captain to give officers in the unit a chance to voice any concerns they had. When problems in the unit continued, a Special Operational Review Team was formed.

13. In fact, the City's[1] own Special Opera

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[1] For ease of reference both Appellants below, the City of San Antonio and Chief Philippus, will be referred to

tional Review Team found: "The problems in the Downtown Foot/Bike Patrol Unit began when Lt. Harry Griffin was assigned as its Unit Commander. Griffin brought with him a change in management style and work philosophy. . . . They [members of the DFU] felt the tactics he instructed them to use were heavy handed, illegal or racially and politically motivated." Serna made his final report opposing the illegal orders in a closed-door meeting when a member of that team questioned him. The reports of the Special Operations Review Team state Serna was working "behind the scenes."

14. As a result of his articulated opposition to the illegal orders Serna was required to follow he was transferred out of the elite Foot and Bike Unit less than one month later. He was banished to patrol duties on the "dogwatch" shift also known as the "graveyard shift" (10:30 p.m. to 6:30 a.m.) in one of the worst area of town. The assignment to which he was transferred was the most dangerous posting in the San Antonio Police Department.

15. The evidence shows that others who voiced concerns about Griffin's orders were also involuntarily transferred to dangerous assignments and shifts. Lt. Griffin, on the other hand, was assigned to work in the Chief's office and quickly promoted to Captain. The

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as "the City."

Chief admitted he conducted no investigation into the repeated reports of illegal conduct by Griffin.

16. Serna was not a disruptive influence. Prior to the transfer, Serna had never been formally disciplined during the entire nine years he was in the DFU. He had never even received counseling or a negative performance evaluation. Sgt. Hester, who supervised Serna for five years and during all times relevant to this action, described Serna as "a senior officer, [and] a good worker" who had a "very good" relationship with the people in the downtown area, that he had never had any problems with officer Serna, and most importantly that Serna was *not* causing problems with other officers in the unit. Sgt. Hester further testified "I never gave him a written evaluation, but if I had to give him one, it would have been a good one," that he had given Serna a written commendation for doing "an exceptional job," and that he had never written Serna up for misconduct. Sgt. Hester also testified that he had not received any complaints about Serna from the other Sergeant in the unit.

17. The Chief knew of the reports and what had transpired in the July '95 meeting with Captain Vernon and the EEO Liaison. Deputy Chief Gleinser testified that the EEO Liaison told him officers in the unit were being compelled to do things that were illegal and violated citizens' civil rights. Deputy Chief Gleinser briefed the Chief on these issues.

18. The DFU is generally acknowledged to be

one of the "premier assignments in the police department" Officers rarely seek to transfer out of the unit. The officers felt it was a privilege to be in the unit. The DFU was a proactive unit, dedicated to the prevention of crime before it happened, as opposed to a normal patrol unit that mostly reacts. A lot of their job was more like public relations. In fact, Chief Al Philippus himself admitted he had publicly described the DFU as the "best of the best."

19. Serna was suddenly and involuntarily transferred to one of the worst if not the undisputed worst part of town working the "dogwatch" from 10:30 p.m. to 6:30 a.m. The transfer was considered a demotion. The Westside dogwatch is the most dangerous shift in the San Antonio Police Department. Serna was transferred to regular patrol duties, which is an entry-level position.

20. Serna was limited in his ability to earn money in after-hours employment as a result of his involuntary transfer. Serna testified: "Q. How much per year have you lost in your earning capacity at Dillard's as a result of the shift change that you endured? A. Somewhere between 4- to $6,000."

ARGUMENT AND AUTHORITIES

A. Issue Number 1

Whether a court's inquiry into a police officer's claim of retaliation for the exercise of free speech should focus on the chilling effect of the retaliatory action instead of on whether it was an adverse employment action.

21. The Fifth Circuit's has decided an important federal question in a way that is in conflict with other Circuits and the relevant decisions of this Court. The circuit court has impermissibly burdened free speech by misapplying this Court's ruling in ***Pickering v. Board of Education***, 391 U.S. 563 (1968). Specifically, the Fifth Circuit has engrafted an adverse employment action requirement onto the claims by police officers or other public sector employees who suffer retaliation for the exercise of free speech. This additional element narrows the protective scope of the First Amendment and is; therefore, at odds not only with ***Pickering*** but also with this Court's decision in ***Connick v. Myers*** which held "the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office." ***Connick v. Myers***, 461 U.S. 138, 154(1983). Requiring an adverse employment action threshold test bypasses the ***Pickering*** and ***Connick*** case-by-case

contextual analysis favored by this Court and impermissibly narrows court authority to protect police officers and other public sector employees like Officer Serna who risk career ending reprisals in order to speak out against illegal orders.

22. ***Pickering*** sets forth a clear and straightforward two-step analysis to determine whether speech by public officials is accorded First Amendment protection. Speech is protected if: 1) the speech addresses issues of public concern (Id. at 574) and if so, then 2) a court must balance the "interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." ***Id. Pickering*** at 568. Accordingly, this Court's analytical framework directs lower courts to focus first on the actual speech and only then on the interests of the parties involved.

23. This Court's ***Pickering*** analysis turns on the whether state action inhibited speech and not whether state action adversely impacted the employment of the speaker. Title VII has an adverse employment action requirement because its primary purpose is to rid our society of discriminatory employment actions. 42 U.S.C. 1983 on the other hand is intended to make violations of federal constitutional rights actionable; therefore, it requires a different analysis. The section 1983 analysis should properly focus on whether gov-

ernmental action inhibits or chills protected speech.

24. The Fifth Circuit has turned ***Pickering*** on its head by requiring not only an adverse employment action but one that is sufficiently sever --not from the perspective of the officers or even of the jury; but rather, from the perspective of the judges' comfortable arm chair. The public policy implications of this are staggering. In their view speech warrants protection presumably only if an officer suffers a substantial loss in pay, is terminated or the like. The circuit court has now signaled, with a wink and a nod to public employers everywhere, that management can stifle any critic, no matter how important and valid their speech, so long as management avoids cutting the employee's pay or terminating the employee. This is myopic judicial activism.

25. The Fifth Circuit's analysis would have us overlook that policing in today's urban centers can be very dangerous and that lateral transfers of police officers can be much more serious than demotions. Police officers traditionally earn their way out of the most dangerous assignments and shifts by towing the line and proving their worth. This is done by doing a good job, respecting their chain of command and following the law. Therefore, when a senior officer in a prestigious posting is suddenly transferred to the "dog watch" or "graveyard" shift in the most dangerous area of the city after speaking out against patently illegal orders, the message to junior officer's is clear: object-

ing to illegal orders is dangerous. It is more important to obey illegal orders than it is to try to right the wrong. This Court should not condone such a policy for America. The law must protect police officer's who speak out on important matters of public concern.

26. Government employees, who happen to reside in the states that comprise the Fifth Circuit and whose First Amendment rights are violated are now going to have to satisfy a greater burden than similarly situated employees in other parts of the country. They will have to "satisfy four elements to recover under 42 U.S.C. § 1983. Specifically, they will have to show that they (1) suffered [a sufficiently sever] adverse employment action; (2) show that the speech in question was on a matter of public concern; (3) show that their interest in commenting on matters of public concern outweighs their employer's interest in efficiency; and (4) show that the speech motivated the adverse employment action." ***Serna v. the City of San Antonio***, 244 F.3d 479 *at 482*. With all due respect, the Fifth Circuit has put the cart before the horse by making the adverse employment action a threshold test.

27. The following examines how the Fifth Circuit did this: ***Serna*** focuses on whether Officer Serna's punishment for speaking out against illegal orders was sever enough to warrant an analysis of the value of his speech to society. In petitioner's view, the threshold issue in a First Amendment case should always focus on the content of the speech and whether

it was a matter of public concern as opposed to a personal concern or trivial matter. If the answer is that the speech was indeed important to society, that it was, a matter of public concern, then a presumption of protection should arise. The Fifth Circuit never reaches this point because it erroneously concluded that the action Serna was complaining about, i.e., the transfer to the Westside "dogwatch" was not an adverse employment action.

28. The Fifth Circuit's narrowing of ***Pickering*** began with ***McGill v. Bd. of Education***, 602 F.2d 774,(7th Cir.1979). ***McGill*** concerned a teacher's involuntary transfer because she complained about school procedures, advocated for collective bargaining agreement in the teacher's lounge and before the school board. The court held "retaliation can take the form of a retaliatory transfer as well as a retaliatory discharge. ***Id.*** at 780. The Seventh Circuit citing ***Pickering*** held "[t]he test [whether a transfer is unconstitutionally retaliatory] is whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech" ***Id.*** Of similar note, ***McGill*** also relies on the Eighth Circuit's holding in "***Simpson v. Weeks***, 570 F.2d 240 (8th Cir. 1978), certiorari denied, [443 U.S. 911], 99 S.Ct. 3101, 61 L.Ed.2d 876, [which also] supports this conclusion. In ***Simpson*** a policeman who suffered a discriminatory reassignment and negative evaluations in retaliation for constitutionally

protected speech recovered under 42 U.S.C. s 1983." *Id.* at n. 9. Therefore, the Seventh Circuit properly focused on the effect on speech as its touchstone rather than focusing on whether an adverse employment action punished the speaker.

29. *Goffer v. Marbury*, 956 F.2d 1045(11th Cir.1992) presented a state university staff member who was discharged after informing university officials of wrong-doing and illegal acts harmful to the university. *Id.* at 1048. The Eleventh Circuit adopted the *Connick/Pickering* two step analysis. The appellate court held "[d]eterminations of public concern, and the balancing itself, require ad hoc case-by-case application...referring to the content, form and context of the speech." *Id.* at 1050. In addition, the appellate court noted the *McGill* "likely to chill" protected speech test vis a vis an adverse employment action. *Id.* at 1049. Therefore, the Eleventh Circuit did not make a fetish of the adverse employment action as a necessary threshold element but rather the court correctly focused on the need to make a case-by case contextual analysis in these types of cases.

30. *McCabe v. Sharrett*, 12 F.3d 1558,(11th Cir.1994) involved a freedom of association claim by the Police Chief's secretary who was involuntarily transferred to the Parks Department upon her marriage to a police officer in the same Police Department because of the need for loyalty and confidentiality in

the effective functioning of the Chief's office. ***Id.*** at 1519-60, 1571 The Eleventh Circuit held "[f]or a public employee to establish that an employment action has infringed a constitutional right the employee must demonstrate that [she or he] suffered some sort of adverse employment action for exercising the right." ***Id.*** at 1564.

31. This is the first major departure from the ***Pickering*** case-by-case analysis approach. The court began to look for an adverse employment action as a mandatory requirement. Moreover, this court required that this inquiry be made before a determination of whether the speech involved matters of public concern under ***Connick. Id.*** at 1565 n.3. This requirement, however, was wholly unnecessary in that case because the defendants had conceded "on appeal that for purposes of constitutional analysis she [had] suffered an adverse employment action." ***Id.*** at 1560. Nonetheless, this set the stage for the Fifth Circuit's wholesale engrafting of an adverse employment action requirement onto First Amendment retaliation claims and set the course for a dramatic split within the Circuits on this important issue.

32. ***Pierce v. Texas Dep't of Criminal Justice,*** 37 F.3d 1146 (5th Cir.), *cert. denied,* (1995). Plaintiff, a female corrections officer, engaged in whistleblowing activity. ***Id.*** at 1148. She was subsequently subjected to numerous acts of investigation, videotaping, poly-

graph examination, threats and writeups. *Id.* at 1149. The appellate court relied upon *McCabe* in holding an adverse employment action is required to recover on a First Amendment retaliation case. *Id.*

33. This ruling was at odds with this Court's ruling in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) which held that the First Amendment protects government employees from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights." *Id. Rutan* at 76 n. 8. The Fifth Circuit, "[chose] not to read the Supreme Court's dicta [concerning trivial acts of retaliation] literally...and began to require more than a trivial act to establish constitutional harm." *Id. Pierce* at 1150 n1. Further, the court rejected *McGill's* "likely to chill" protected speech test and instead held that although some actions may chill protected speech, they are not actionable. *Id.* Such categorical rejection of *Pickering* and its progeny *Rutan, Simpson, Goffer,* and *McGill* is an unwarranted departure from the law protecting speech on matters of public concern.

34. Then, in *Harrington v. Harris*, 118 F.3d 359 (5th Cir.1997), a Fifth Circuit panel addressed, among other claims, whether white law professors were retaliated against on the basis of protected speech. The alleged retaliation involved employer criticism and failure to award higher merit pay increases. *Id.* at 365

and 366. The court set forth a three prong free speech retaliation test. *Id.* at 365. The appellate court applied another two part First Amendment retaliation test: '[1] a public employee must allege facts demonstrating that his speech involved a matter of public concern, and [2]that he "has suffered an adverse employment action for exercising [his] right to free speech." ***Pierce v. Texas Dep't of Criminal Justice, Institutional Div.***, 37 F.3d 1146, 1149 (5th Cir.1994).]' ***Harrington*** at 365 (internal citations omitted). The Fifth Circuit assumed the speech was a matter of public concern and then focused on the adverse employment action prong stating "(1) did Plaintiffs suffer an adverse employment action and, if so, (2) was such adverse employment action taken in retaliation for Plaintiffs' exercise of free speech." *Id.* The appellate court added "[m]any actions which merely have a chilling effect upon protected speech are not actionable. *Id.* Therefore, the Fifth Circuit has made it clear that it regards our right to free speech less important than public sector employers' right to stifle speech except in very limited circumstances. Our circuit jurisprudence has gone from the point not long ago when all speech was presumptively protected to the point where now it is presumptively unprotected.

35. ***Harris v. Victoria Ind. Sch. Dist.***, 168 F.3d 216, 225-26 (5th Cir.), *cert. denied*, (1999). In ***Harris*** two teachers alleged they were involuntarily transferred

in retaliation for the exercise of protected speech. Plaintiffs appealed the lower court's ruling that the teachers had not spoken on a matter of public concern. The Fifth Circuit held the plaintiffs' transfers were adverse employment actions and their speech a matter of public concern. *Id.* at 221, 223 even though the facts were much less egregious that they are in the instant case.

B. Issue Number 2

Whether the Fifth Circuit applied an incorrect standard of review and therefore analyzed the evidence under a standard which conflicts with this Court's decision in *Reeves v. Sanderson Plumbing Prods.* 530 U.S. 133 (2000).

36. This case involves a question of exceptional importance; namely, the proper standard of review to be applied in motions for judgment as a matter of law and motions for summary judgment.[2]

37. The panel's description of the standard of review and its analysis of the evidence under that

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[2] This case involves a motion for judgment as a matter of law, but the same standard of review will apply to motions for summary judgment. *Bazan v. Hidalgo County*, 2001 WL 293516 (5th Cir. Mar 27, 2001).

standard conflicts with the standard of review required by the Supreme Court in ***Reeves v. Sanderson Plumbing Prods.***, 530 U.S. 133 (2000). The standard of review on these issues is of critical importance given the huge number of cases involving summary judgment and motions for judgment as a matter of law decided in this circuit every year. It is difficult to imagine any ruling that could have broader application.

38. The panel described the standard of review as follows:

> In reviewing whether or not there was evidence sufficient to support a jury's verdict we review all the evidence in the record, drawing all reasonable inferences in favor of the non-moving party and without making determinations about the credibility of witnesses or the weight of the evidence. ***Reeves v. Sanderson Plumbing Prods.***, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000).

39. This description left out the second half of the standard. The part left out which immediately followed the ***Reeves*** language cited by the panel, is as follows:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury

> functions, not those of a judge." ***Liberty Lobby***, supra, at 255, 106 S.Ct. 2505. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. *See* Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses." ***Id.***, at 300.

Reeves, 530 U.S. at 150-151.

40. The other cases following ***Reeves*** have included the language omitted by the panel decision as part of the standard of review.[3] Other cases from the

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[3] *See, Kinserlow v. CMI Corp.*, 217 F.3d 1021, 1025 (8th Cir. 2000); *Smith v. Network Solutions, Inc.*, 135 F.Supp.2d 1159, 2001 WL 286752 (N.D. Ala. Mar 22, 2001); *Martin v. Applied Cellular Technology, Inc.*, ___ F.Supp.2d ___, 2001 WL 276950 (D. N.H. Mar 21, 2001); *Whartenby v. Winnisquam Regional School Dist.*, ___ F.Supp.2d ___, 2001 WL 274748 (D. N.H. Mar 14, 2001); *Interim Healthcare of Columbus v. Shalala*, 2001 WL 242569 (S.D. Ohio Mar 08, 2001); *Jamal v. Travelers Lloyds of Texas Ins. Co.*, 131 F.Supp.2d

Fifth Circuit have even emphasized the importance of the omitted part of this standard.

> This is consistent with the Supreme Court's recent statement that, in deciding whether to grant judgment as a matter of law, a "court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, ***at least to the extent that that evidence comes from disinterested witnesses*** ".

Bazan v. Hidalgo County, 2001 WL 293516 (5th Cir. Mar 27, 2001) (emphasis original). ***See also, Doe v. Beaumont Independent School Dist.***, 240 F.3d 462, 485 n. 10 (5th Cir. 2001) (en banc) (Wiener joined by five others concurring in part and dissenting in part).

41. The panel erred because it considered evidence favorable to the City that the jury was not required to believe. The evidence favoring the City set

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910, 2001 WL 253063 (S.D. Tex. Feb 22, 2001); *Eber v. Harris County Hosp. Dist.*, 130 F.Supp.2d 847, 2001 WL 114650 (S.D. Tex. Feb 01, 2001); *S.E.C. v. Yun*, 130 F.Supp.2d 1348, 2001 WL 92144, (M.D. Fla. Jan 12, 2001); *Davis v. Guardian Life Ins. Co. of America*, F.Supp.2d ___, 2000 WL 1848596 (E.D. Pa. Dec 15, 2000); *Baynard v. Lawson*, 112 F.Supp.2d 524, 528-29 (E.D. Va. 2000).

out in the panel's opinion was neither uncontradicted nor from disinterested witnesses. All of the evidence cited by the panel that favors the City came from police officers that worked for the City of San Antonio and under its Chief of Police, who was an individual defendant. An employee of a party is an interested witness. ***U.S. v. Bayer***, 331 U.S. 532 (1947); ***Thurber Corp. v. Fairchild Motor Corp.***, 269 F.2d 841 (5th Cir. 1959).

Issue Number 3
Whether the Fifth Circuit's improper credibility determinations, weighing, and credence of contradicted evidence and evidence from interested witnesses is in conflict with this Court's decision in *Reeves v. Sanderson Plumbing Prods.* 530 U.S. 133 (2000).

42. The following quotes from the panel's opinion are in conflict with ***Reeves***. The point of this evidentiary analysis is to demonstrate the very real impact that the application of an improper standard of review has had on this case, and will have on any future motions for summary judgment or motions for judgment as a matter of law decided in this circuit. ***Serna wins hands down once the proper standard of review is applied.***

43. The opinion states: "However, Serna produced no evidence confirming his belief [4] that this label followed him. In particular, he never identified any officer who held this opinion in his new assignment. Nor did he identify any officer who thought any less of his abilities. In fact, every officer who testified to this issue at trial stated that they still thought of Serna as a good officer." In fact, Serna did identify several officers by name that thought the label followed him. (RR 340-41, 356-57) The panel also improperly inferred evidence against Serna here. Officer Johnson testified that an involuntary transfer (like Serna was subjected to) sends the message around the department that the officer has been disciplined and that the stigma from that follows the officer from department to department. (RR 602) Officer Froelick testified that an officer who is transferred like Serna always gets blackballed and that being labeled a silent instigator would have a negative effect on this career. (RR 518-19) The Chief told Serna he was transferred for being "a silent instigator" by going "behind the scenes and encouraging police officers to file grievances and complaints to embarrass their supervisors." (RR 171) It should go without saying that the very conduct

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4 He didn't need to under the proper standard of review. The court is not to weigh the evidence or make credibility determinations. Testimony from one witness is enough.

identified by the Chief as being the basis for this punitive transfer were each examples of protected activities, to wit: "encouraging officers to file grievances and complaints." Rather then pay attention to the valid content of the speech, Chief Philippus saw only an effort "to embarrass their supervisors". The transfer blackballed Serna. (RR 175) The fact that he was labeled a silent instigator got around the department, and Serna was still hearing comments about it four years later. (RR 175-176) Involuntary transfers happen rarely. (RR 1376) Serna was labeled and that will follow him the rest of his career. (RR 355-356) Several officers came up to Serna since the transfer and sated that they had heard he was a troublemaker. (RR 356)

44. The opinion states: "Moreover, Serna testified that he had never taken a qualifying examination or other steps to seek a promotion. Indeed, the panel improperly spins the evidence to draw inferences against Serna here. It omitted the proof regarding why Serna had not sought a promotion. There is no basis for the court's decision to disregard Serna's testimony. The court "may not make credibility determinations or weigh the evidence." ***Reeves***, 530 U.S. 133.

45. The opinion states: "However, such a reduction in his pension would result solely from Serna's desire to retire early. R., Vol. 8 at 353. No other evidence tended to establish any obstacle to Serna's working to the usual retirement age." Here

again the panel omits critical evidence supporting the verdict. Beside the fact that he lost any chance of advancement (as established by the evidence above), the evidence also showed Serna feared for his life based on the fact that he was now assigned to the most dangerous area of the city for police officers and officers who have been blackballed find it difficult to get the support they need from other officers on the street. (RR 175)

46. In addition to violating the mandate of ***Reeves***, the panel's decision conflicts with other Fifth Circuit opinions that held that transfers under very similar circumstances were adverse employment actions. A transfer, even without a salary reduction may be an adverse employment action. ***See, Southard v. Texas Bd. of Crim. Justice***, 114 F.3d 539, 555 (5th Cir. 1997). This court in ***Forsyth v. City of Dallas, Texas***, 91 F.3d 769, 774 (5th Cir. 1996), *cert. denied*, 522 U.S. 816 (1997), held that transferring police officers from an intelligence unit to night uniformed patrol, after they made allegations of illegal wiretapping within the police department, constituted demotions even without a reduction in the officers' pay. The intelligence unit positions were more prestigious, had better working hours, and were more interesting than night patrol. The court also noted that few officers voluntarily transferred from the intelligence unit to night patrol. ***See also, Fyfe v. Curlee***, 902 F.2d 401,

404 (5th Cir.), *cert. denied*, 498 U.S. 940 (1990) (holding that a transfer to a less desirable but equally paying job constituted a demotion). In ***Sharp v. City of Houston***, 164 F.3d 923, 933, (5th Cir. 1999) this court held:

> It is now well established that, for the purposes of a § 1983 retaliation claim, an adverse employment action can include a transfer, because it may serve as a demotion. A transfer may also constitute a demotion. To be equivalent to a demotion, a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse--such as being less prestigious or less interesting or providing less room for advancement. The jury could have viewed transferring from the elite Mounted Patrol to a teaching post at the Police Academy to be, objectively, a demotion. (citations omitted, emphasis added)

46. In ***Click v. Copeland***, 970 F.2d 106 (5th Cir. 1992), two sheriff's deputies were transferred from the county's law enforcement section to positions as jail guards because they had engaged in conduct protected by the First Amendment. Although the deputy sheriffs suffered no reduction in pay they argued their transfers were demotions because the jail guard positions were much less desirable than their previous ones. In

agreeing that the deputy sheriffs' transfers were demotions, the court explained:

> Money alone does not buy happiness. The Perry Court spoke of "benefits" generally, not just salary [citing ***Perry v. Sindermann***, 408 U.S. 593, 597 (1972]. The evidence adduced at trial strongly supports the proposition that jobs in the jail are not as interesting or prestigious as jobs in the law enforcement section...

970 F.2d at 109.

47. The panel's decision also conflicts with that of other circuits. The 3d circuit analyzed a similar set of facts as follows:

> Hampton maintains that on August 28, 1995, he was suddenly told by Major White that he was being removed from the detective bureau and reassigned to road patrol. Hampton deems this to be a demotion. No explanation for the transfer was given, and although the transfer was to have been "temporary," the record reflects that it remains in effect... Defendants argue that Hampton's transfer was merely a reassignment and not a demotion, as neither Hampton's rank, nor his pay have been decreased. Defendants'

> further argue that the reassignment was part of a routine rotation schedule... Although the rotation may not be a demotion, it came on the heels of his EEOC filing, and plaintiffs argue that the road patrol assignment is less desirable than that of detective bureau... The significance of these facts should be resolved by jury deliberations, not motions for summary judgment.

Hampton v. Borough of Tinton Falls Police Dept., 98 F.3d 107, 116 (3rd Cir. 1996). ***See also, McGill v. Board. of Educ.***, 602 F.2d 774, 780 (7th Cir.1979) (transfer of teacher to a less desirable school). The opinion also conflicts with the view of the Supreme Court.

> We . . . determine that promotions, ***transfers***, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. In doing so, we reject the Seventh Circuit's view of the appropriate constitutional standard by which to measure alleged patronage practices in government employment. The Seventh Circuit proposed that only those employment decisions that are the "substantial equivalent of a dismissal" violate a public

> employee's rights under the First Amendment. We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy.

Rutan v. Republican Party, 497 U.S. 62, 76 (1990)

48. The Fifth Circuit also wrongly concluded that the City's motion for judgment as a matter of law was timely under Rule 50. Rule 50 states that the motion must be filed "before submission of the case to the jury." Fed. R. Civ. P. 50(a)(2). The City rested, the evidence was closed, the charge was read to the jury, closing arguments were made and the jury was dismissed to begin its deliberations. (RR 1733-1736, 1783) The City did make its motion for judgment as a matter of law until the next day. (RR 1795) The jury had already begun deliberations! The panel's opinion liberally construes the timing requirement of Rule 50 out of existence.

REASONS FOR GRANTING WRIT AND CONCLUSION

49. The Fifth Circuit's has decided an important federal question in a way that is in conflict with other circuits and also in conflict with prior decisions of this

Court. The circuit court has impermissibly burdened free speech by misapplying this Court's ruling in ***Pickering v. Board of Education***, 391 U.S. 563 (1968). Specifically, the Fifth Circuit has engrafted an adverse employment action as a threshold requirement to claims by police officers or other public sector employees who suffer retaliation for the exercise of free speech.

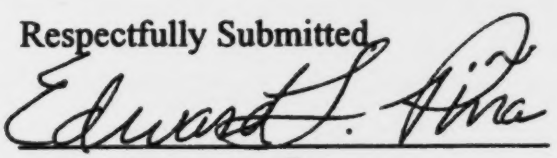
50. Furthermore, the analysis set forth above establishes that the panel's opinion violates the ***Reeves*** standard in the following ways: (1) it made credibility determinations by discounting Serna's own testimony, (2) it weighed the evidence as is made clear by the repeated use of the term "however" following a description of evidence favorable to Serna, (3) it made inferences against Serna, (4) it gave credence to evidence and theories that were contradicted by evidence favoring Serna, and (5) it gave credence to evidence favoring the City even though that evidence came from interested witnesses.

51. Petitioner's counsel of record has expended a total of 130 hours in the research, drafting, preparation and finalizing of this petition. These services were billed at the reasonable and customary rate of $170.00 for Mr. Medellin and at $200.00 per hour for Mr. Pina for which petitioner hereby seeks an award. Exemplification and binding costs are expected to exceed $550.00 and filing fees of $300.00 for which petitioner requests reimbursement. Finally, petitioner

also requests an award of attorney fees and costs incurred in the Court of Appeals and all other relief to which petitioner may be justly entitled.

WHEREFORE, PREMISES CONSIDERED, petitioner, Onofre Serna prays that the Court thoroughly consider this Petition for Writ of Certiorari, as well as the status of the legal precedents, then grant the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and order briefing of the issues and argument of this case. Attorney fees and costs are also requested.

Respectfully Submitted,



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

ONOFRE SERNA,	)	**MAY 25 1999**
	)	**Clerk, U.S. District. Court**
Plaintiff,	)	**Western District. of Texas**
	)	**By /S/**
	)	**Deputy Clerk**
VS.	)	**Civil Action No:**
	)	**SA-98-CV-0161-EP**
CITY OF SAN	)	
ANTONIO, ET AL.,	)	
	)	
Defendants.	)	

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are

not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

TEXAS WHISTLEBLOWER ACT
INSTRUCTION NO. _____

Under Texas law, an employer may not retaliate against an employee for making a good faith report of a legal violation to an appropriate law enforcement officer. A transfer within employment may be a retaliatory action. To succeed on this claim, the plaintiff must prove that (1) he made a good faith report (2) of a violation of the law (3) to an appropriate law enforcement authority, and (4) that he was transferred because of the report.

Plaintiff's report must have been made in good faith. "Good faith" has two components: subjective and objective good faith. Thus, (1) the employee must have believed that the conduct reported was a violation of the law, and (2) his belief must have been reasonable in light of the employee's training and experience. Under the second element, then, even if the Plaintiff honestly believed that the reported act was a violation of law, the Chief of Police violated the Whistleblower Act by transferring Plaintiff only if a reasonably prudent police officer in similar

circumstances would have believed that the facts reported were a violation of the law.

The Plaintiff's report need not have been made in writing. Verbal reports may qualify, depending on the substance of the conversation and the intent of the party speaking. In addition, nothing in the Whistleblower Act excludes statements made at a meeting from constituting a report of a violation of law.

The violation of law, if any, reported by Plaintiff must be such that there would be a probable adverse or detrimental effect on the public good or society in general. The term "violation of law" does not merely refer to internal or personnel management issues that may arise within the agency.

"Appropriate law enforcement authority" means an authority that has the power and duty of...

[Note page eight (8) the next page of the Court's Instructions to the Jury is absent from the Record and therefor note provided herein]

CIVIL RIGHTS - 42 U.S.C. § 1983 AND TEXAS CONSTITUTION
INSTRUCTION NO. _____

The Plaintiff claims that the Defendants, while acting "under color of state law," intentionally deprived the Plaintiff of rights secured by the Constitution of the United States and the Texas

Constitution by transferring him from the Downtown Foot and Bike Patrol Unit because of his exercise of the rights to free speech and free association.

The Texas Constitution and the First Amendment of the United States Constitution give every citizen the right to freedom of speech to speak out on matters of public concern. The state constitution and the First Amendment also give every citizen the right to freely associate with others. The right to associate includes the right to associate for social, legal. Or economic purposes, as well as the right to associate in officially organized political groups.

A person may sue for an award fo money damages against anyone who, "under color" of any State law or custom, intentionally violates that person's rights under the Constitution of the United States.

Thus, the Plaintiff must prove by a preponderance of the evidence each of the following:

A. That the actions of the Defendants were "under color" of the authority of the City of San Antonio;

B. That the Plaintiff's speech and/or association activities were constitutionally "protected" under the First Amendment;

C. That the Plaintiff's exercise of protected First Amendment rights was a substantial or motivating factor in the Defendants'

decision transfer him from the Downtown Foot and Bike Patrol Unit; and

D. That the Defendants' acts were the proximate or legal cause of the Plaintiff's damages.

Local officials act "under color" of the authority of the state when they act within the limits of their lawful authority. However, they also act "under color" of the authority of the State when they act within lawful authority or beyond the bounds of their lawful authority in their acts are done while the officials are purporting or pretending to act in the performance of their official duties. An official acts "under color" of the state authority if he abuses or misused a power that he possesses only because he is an official.

The chief of police is an official whose acts constitute final official policy of the City of San Antonio. Therefore, if you find that the acts of the chief of police deprived the Plaintiff or constitutional rights, the City of San Antonio is liable for such deprivations.

Speech by public employees concerning the official misconduct, wrongdoing, or malfeasance of public officials is protected by the First Amendment. In determining whether the Defendants intentionally violated the Plaintiff's First Amendment rights of speech and association, you must remember that the

Plaintiff as a public employee has a right to practice those rights only to the extent that such practice does not unduly interfere with the duties and responsibilities of the Plaintiff's employment. In determining whether the Plaintiff's activities in this case were protected activities under the First Amendment, you must balance the Plaintiff's First Amendment interests against the Defendants' interests in promoting the efficiency of the public service it performs through its employees. The First Amendment requires the Defendant not just to show that the speech injured it, but to show that the benefits of preventing the injury actually outweighed the benefits of free speech. Therefore, if you find under all the circumstances presented that a reasonable public employer could have concluded that the Plaintiff's activities unduly interfered with the duties and responsibilities of the Plaintiff's employment, you must find that the activities were not protected under the First Amendment.

OFFICIAL IMMUNITY
INSTRUCTION NO._____

If you find that the Plaintiff has proven his claim, you must then consider the Defendants' defense, that they acted in good faith and thus are not liable.

Chief Philippus is presumed to know about the basic, unquestioned constitutional rights of his employees. Thus the Plaintiff need not prove that the Defendants acted with the specific knowledge of the Plaintiff's particular constitutional right that he violated.

If, after considering the scope of the discretion and responsibility generally given to police officers in the performance of their duties, and after considering all of the circumstances of the case as they would have reasonably appeared at the time, you find from a preponderance of the evidence that the Defendants had a reasonable and good faith belief that their actions would not violate the Plaintiff's constitutional rights, then you cannot find them liable even if the Plaintiff's rights were in fact violated as a result of the Defendants' good faith action.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ONOFRE SERNA,	)Filed 5-26-99
	)Clerk, U.S. District. Court
Plaintiff,	)Western District. of Texas
	)By /S/
	) Deputy
VS.	) **Civil Action No:.**
	) **SA-98-§CV-0161-EP**
CITY OF SAN	)
ANTONIO, ET AL.,	)
	)
Defendants.	)

VERDICT

JURY QUESTION NO. 1

1. Do you find from a preponderance of the evidence that Onofre Serna was transferred in retaliation for making a good faith report of a violation of law to an appropriate law enforcement authority or agent?

Yes X No _____

If you answered "yes" to question No. 1, proceed to question No. 2. If you answered "no" to question No. 1, then proceed to question No. 3.

JURY QUESTION NO. 2

2. What sum of money, if any, if paid now in cash, would compensate Onofre Serna for damages he suffered as a result of the transfer and retaliation by the City of San Antonio? Consider the following elements of damages only:

A. Low wages in the past (between the date of transfer or retaliation and today):
$ 15,000.00

B. Lost wages and employment benefits that will in reasonable probability be incurred in the future:
$ 40,000.00

C. Mental anguish and suffering the in the past, including but not limited to, loss of reputation:
$ 70,000.00

D. Mental anguish and suffering that will in reasonable probability be incurred in the future, including, but not limited to, loss of reputation:
$ - 0 -

E. Loss of reputation in the past:
$ 25,000.00 .

F. Loss of reputation that in reasonable probability will be experienced in the future:
$ 100,000.00

JURY QUESTION NO. 3

3. Do you find that Onofre Serna's freedom of speech was violated by the Defendants?

Yes X No _____

If you answered "yes" to question No. 3, then anser question No. 4. If you answered "no" to question No. 3, then proceed to question No. 8.

JURY QUESTION NO. 4

4. Do you find from a preponderance of the evidence that the Defendants had a reasonable and good faith belief that their actions would not violate Onofre Serna's constitutional right to freedom of speech?

Yes _____ No X

If you answered "no" to question No. 4, then answer

question No. 5. If you answered "yes" to question No. 4, then proceed to question No. 8.

JURY QUESTION NO. 5

5. What amount of money, if any, would reasonably and fairly compensate Onofre Serna for his damages caused by the conduct addressed in question No. 3?

$ 125,000.00

JURY QUESTION NO. 6

6. Do you find from a preponderance of the evidence that, in engaging in the conduct described in question No. 3, Chief Philippus acted willfully or with malice?

Yes _____ No X

If you answered "yes" to question No. 6, then answer question No. 7. If you answered "no" to question No. 6, then proceed to question No. 8.

JURY QUESTION NO. 7

7. What sum of money, if any, do you find should be awarded to Onofre Serna against Chief Philippus as punitive or exemplary damages in connection with the

conduct described in question No. 3?

$ ___ - 0 - ___

JURY QUESTION NO. 8

8. Do you find by a preponderance of the evidence that the Defendants violated Onofre Serna's freedom of association rights?

Yes ___ X ___ No _____

If you answered "yes" to question No. 8, then answer question No. 9. If you answered "no" to question No. 8, proceed to the final page of th verdict form.

JURY QUESTION NO. 9

9. Do you find from a preponderance of the evidence that the Defendants had a reasonable and good faith belief that their actions would not violate Onore Serna's constitutional right to freely associate?

Yes _____ No ___ X ___

If you answered "no" to question No. 9, then answer question No. 10. If you answered "yes" to question No. 9, then proceed to the final page of the verdict

form.

JURY QUESTION NO. 10

10. What amount of money, if any, would reasonably and fairly compensate Onofre Serna for his damages caused by the conduct addressed in question No. 8?

$ 125,000.00

JURY QUESTION NO. 11

Do you find, from a preponderance of the evidence, that, in engaging in the conduct described in question No. 8, Chief Philippus acted willfully in with malice?

Yes _____ No X

If you answered "yes" to question No. 11, then anser question No. 12. If you answered "no" to question No. 11, then sign and date this verdict form.

JURY QUESTION NO. 12

12. What sum of money, if any, do you find should be awarded to Onofre Serna against Chief Philippus as punitive or exemplary damages in connection with the conduct described in question No. 8?

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SO SAY WE ALL.

Signed: /S/ Susan Gonzalez/S/

Date: 5/26/99

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
JUN 10, 1999
Clerk, U.S. District. Court
Western District. of Texas
By /S/
Deputy

ONOFRE SERNA,	)	
	)	
Plaintiff,	)	
	)	
	)	
VS.	)	**Civil Action No:**
	)	**SA-98-CV-0161-EP**
CITY OF SAN	)	
ANTONIO, ET AL.,	)	
	)	
Defendants.	)	

ORDER

On this date the Court considered the status of the above-numbered and styled cause and issues the following Order.

On May 26, 1999, the jury in this case awarded the Plaintiff, Onofre Serna, $500,000 in total damages for his constitutional and statutory claims against the Defendants. The Court finds, upon review of that verdict, that an error in the verdict form mandates that the final judgment be reduced by $25,000. *See*

FED.R.CIV.P.60(a); *Alvarez v. McDermott*, 674 F.2d 1037, 1046 (5th Cir. 1982); *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 963-64 (5th Cir. 1981).

Jury question No. Two asked the jury to assess damages against the Defendants if it found that Defendants had violated the Texas Whistleblower Act. The question was divided into several subparts; two of those parts asked the jury to assess damages for mental anguish in the past and future, "including, but not limed to, loss of reputation." However, two additional subparts asked the jury to assess damages for loss of reputation separately from mental anguish damages. The jury awarded Serna $70,000 for past mental anguish, including loss of reputation damages, and $25,000 again for loss of reputation. The Court finds that the second figure is subsumed by the first; accordingly, the total damages must be reduced by $25,000. The Court finds that this amendment is akin to the amendments allowed under Federal Rule of Civil Procedure 60(a) and the cases cited above and does not amount to a reexamination of the facts upon which the verdict was based. *See Partridge*, 636 F.2d at 964.

ACCORDINGLY, it is ORDERED that the judgment in this matter will reflect that the Court reduced the jury award to $475,000 in order to give effect to the juror's intentions.

SIGNED and ENTERED this 10th day of July, 1999.

/S/ Edward C. Prado /S/
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

ONOFRE SERNA,	)	**JUN 10, 1999**
	)	**Clerk, U.S. District. Court**
Plaintiff,	)	**Western District. of Texas**
	)	**By /S/**
	)	**Deputy**
VS.	)	**Civil Action No:**
	)	**SA-98-CV-0161-EP**
CITY OF SAN	)	
ANTONIO, ET AL.,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the jury verdict entered on May 26, 1999, and the Court's Order issued this same day, it is hereby ORDERED, ADJUDGED and DECREED that JUDGMENT is GRANTED in favor of the Plaintiff, Onofre Serna, and against the Defendants Al Philippus and the City of San Antonio in the amount of $475,000.

It is further ORDERED, ADJUDGED and DECREED that, pursuant to 28 U.S.C. § 1961, post-

judgment interest is also GRANTED, and shall accrue on the judgment at the rate of 4.879 percent.

SIGNED and ENTERED this 10th day of June, 1999.

/S/ Edward C. Prado /S/
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

ONOFRE SERNA,	)	**JUL 08, 1999**
	)	**Clerk, U.S. District. Court**
Plaintiff,	)	**Western District. of Texas**
	)	**By /S/**
	)	**Deputy**
VS.	)	**Civil Action No:**
	)	**SA-98-CV-0161-EP**
CITY OF SAN	)	
ANTONIO, ET AL.,	)	
	)	
Defendants.	)	

AMENDED JUDGMENT

In accordance with the jury verdict entered on May 26, 1999, the Court's Order issued June 10, 1999, and the Court's Order issued on this same date, it is hereby ORDERED, ADJUDGED, and DECREED that JUDGMENT is GRANTED in favor of the Plaintiff, Onofre Serna, and against the Defendants Al Philippus and the City of San Antonio in the amount of $475,000. It is further ORDERED, ADJUDGED, and DECREED that the Plaintiff is awarded pre-judgment

interest on his claim under the Texas Whistleblower Act in the amount of $23,605.88. Finally, it is ORDERED, ADJUDGED, and DECREED that, pursuant to 28 U.S.C. § 1961, post-judgment interest is GRANTED and shall accrue on the judgment at the rate of 4.947 percent.

SIGNED and ENTERED this 6th day of July, 1999.

/S/ Edward C. Prado /S/
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50775

U.S. Court of Appeals
FILED
Mar 26 2001
CHARLES R. FULBRUGE III
CLERK

ONOFRE SERNA
Plaintiff - Appellee

v.

CITY OF SAN ANTONIO; AL PHILIPPUS
Defendants - Appellants

- -

Appeals from the United States District Court for the Western District of Texas, San Antonio

- -

Before JOLLY and DAVIS, Circuit Judges, and RESTANI[1], Judge.

W. EUGENE DAVIS, Circuit Judge:

Onofre Serna, a police officer in the City of San

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[1] Judge, U.S. Court of International Trade, sitting by designation.

Antonio, Texas, sued the City of San Antonio and its Chief of Police, Al Philippus, for transferring him to a different unit on the police force in retaliation for his reporting illegal orders issued by his commanding officer. The district court entered a judgment for Serna after a jury returned a verdict for Serna on both his 42 U.S.C. § 1983 claims and his claim under the Texas Public Whistleblower Act, TEX. GOV'T CODE ANN. § 554.001 et seq. (Vernon Supp. 2000) and awarded him $500,000 in damages. Because the evidence at trial was insufficient for a reasonable jury to conclude that Serna suffered an adverse employment action as a result of his transfer, we reverse the judgment of the district court and render judgment for the City and Chief Philippus.

I.

This lawsuit arises out of Serna's service in the Downtown Foot and Bike Patrol Unit of the San Antonio Police Department. Serna joined the unit in 1987, having joined the police force two years earlier. In 1995, when problems in the unit came to a head, the unit was commanded by Captain Rudy Vernon and Lieutenant Harry Griffin. The problems in the unit grew out of friction between some members of the unit and Griffin. In particular, Griffin and several members of the evening shift, of which Serna was a part, did not get along.

In 1995 Griffin called for cover from other

officers in his unit while he was detaining a suspect. Four officers, Serna not among them, did not cover Griffin even though they were in a position to do so. These four officers were then transferred out of the unit as a result of their failure to cover Griffin. They filed complaints with the Police Department's equal employment opportunity officer, Linda Taylor, to protest their transfer and to complain about their treatment by Griffin.

Taylor arranged a meeting between Griffin and the members of his unit to try to clear the air after she heard the complaints of the four transferred officers. The meeting, held in July of 1995, failed to settle the problems in the unit.

Several officers, including Serna, felt that Griffin was giving illegal orders to them. These orders were, they thought, to harass the homeless and the minority teenagers who frequented downtown, to confiscate alleged gang paraphernalia and not return it to its rightful owner, and to selectively enforce public intoxication statutes against downtown bars that catered to a minority and working class clientele. These officers, including Serna, complained about these orders at the meeting convened by Taylor in July of 1995.

As a result of continuing tension in the unit, Chief Philippus appointed a special committee to investigate the source of the problems. The committee

interviewed every member of the unit, including Serna, and issued a report in July of 1996. The committee concluded that a group of officers, Serna prominent among them, were disruptive and encouraged other officers to show disrespect to their supervisors. The committee also concluded that Griffin was a poor manager and unfairly denigrated the efforts of the evening shift. To solve the problems in the unit, the committee recommended, in part, that Serna be transferred out of the unit. Chief Philippus did just that, transferring Serna to a regular patrol unit in July of 1996.

II.

In August of 1996 Serna filed suit against the City in the 37th Judicial District Court in Bexar County, Texas. Serna alleged that he had been transferred in retaliation for reporting Griffin's illegal orders in violation of the Texas Public Whistleblower Act, TEX. GOV'T CODE ANN. § 554.001 et seq. (Vernon Supp. 2000). Serna later amended his complaint to add Chief Philippus as a defendant and to add claims that he had been transferred in retaliation for exercising his rights of free speech, free association, equal protection, and due process in violation of 42 U.S.C. § 1983. The City and Chief Philippus timely removed the suit to federal court.

The district court granted summary judgment to the City and Chief Philippus on Serna's equal

protection and due process § 1983 claims. The remainder of Serna's claims were tried to a jury. After nine days of testimony, the jury found for Serna on his Texas Whistleblower Act claim, his free speech § 1983 claim, and his free association § 1983 claim and awarded him $500,000 in compensatory damages. The district court entered judgment for Serna after first lowering the damage award to $475,000 due to a drafting error in the jury form.

The City and Chief Philippus now appeal the judgment entered by the district court on numerous grounds, including that the district court should have granted them judgment as a matter of law because there was insufficient evidence for the jury to find that Serna suffered an adverse employment action as a result of his transfer.

III.

[1][2] We review a district court's decision to grant judgment as a matter of law de novo. Travis v. Bd. of Regents of the Univ. of Tex. Sys., 122 F.3d 259, 263 (5th Cir.1997). In reviewing whether or not there was evidence sufficient to support a jury's verdict we review all the evidence in the record, drawing all reasonable inferences in favor of the non-moving party and without making determinations about the credibility of witnesses or the weight of the evidence. Reeves v. Sanderson Plumbing Prods., ___ U.S. ___, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000).

To properly preserve review of a jury's verdict based on the sufficiency of the evidence, a party must move for judgment as a matter of law after the close of all the evidence. Bay Colony, Ltd. v. Trendmaker, Inc., 121 F.3d 998, 1003 (5th Cir.1997); Purcell v. Seguin State Bank and Trust Co., 999 F.2d 950, 956-57 (5th Cir.1993); McCann v. Tex. City Ref., Inc., 984 F.2d 667, 671 (5th Cir.1993). If a party does not make such a motion, it can not ordinarily raise the issue of sufficiency of the evidence in its post- verdict motion under Fed.R.Civ.P. 50(b) or on appeal.

In this case the City and Chief Philippus made their motion for judgment as a matter of law after the jury had been charged and had begun deliberations, but before it returned a verdict. Thus, their motion was untimely. However, our court has always approached the requirements of Fed.R.Civ.P. 50 with a, "liberal spirit." Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772, 780 (5th Cir.1999); McCann, 984 F.2d at 671; Davis v. First Nat'l. Bank of Killeen, Tex., 976 F.2d 944, 948 (5th Cir.1992). In particular, we have been willing to excuse a failure to strictly comply with the requirements of Fed.R.Civ.P. 50 so long as the purposes of the rule are satisfied. Quinn v. Southwest Wood Prods., Inc., 597 F.2d 1018, 1026 (5th Cir.1979).

The facts of this case are closely analogous to

those of Quinn. In Quinn, the party moving for judgment as a matter of law made its motion after the jury had been charged and had retired, though before it had begun deliberations. We held that though the motion was untimely, there was nothing in the record to suggest that the moving party intended to gamble on the verdict. The district court accepted the motion and ruled on its merits. We observed that it was still possible to recall the jury and put on more evidence. As such, we considered the moving party's challenge to the sufficiency of the evidence properly preserved. Id. at 1026. In this case, there is also nothing in the record to suggest that the City and Chief Philippus intended to gamble on the jury's verdict. The district court accepted the motion by the City and Chief Philippus over the objection of Serna that it was untimely and ruled on the merits of the motion. R., Vol. 15 at 1795. Serna did not argue that he was being treated unfairly and he made no argument that he would have offered more evidence had the motion been made timely.

The timing of the motion in this case was anomalous and inconvenient. That the district court chose to rule on the merits of this motion makes this case unique; had the district court rejected the motion as untimely then we would be faced with a very

different situation.[1] [FN1] However, as the district court did not reject the motion as untimely, we are convinced that the City and Chief Philippus did not gamble on the jury's verdict in this case. Because the City and Chief Philippus acted in such a manner as to satisfy the purposes of Fed.R.Civ.P. 50, we hold that their objections to the sufficiency of the evidence are properly preserved for review.

IV.

A party must satisfy four elements to recover on a First Amendment retaliation claim under 42 U.S.C. § 1983. The party must (1) suffer an adverse employment action; (2) show that the speech in question was on a matter of public concern; (3) show that their interest in commenting on matters of public concern outweighs their employer's interest in efficiency; and (4) show that the speech motivated the adverse employment action. Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 220 (5th Cir.1999), cert. denied, 528 U.S. 1022, 120 S.Ct. 533, 145 L.Ed.2d 413

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The district court in its post-trial Order Denying Defendants' Motion for Judgment as a Matter of Law or For New Trial found specific issues preserved including whether First Amendment rights were implicated, whether an adverse employment action occurred, qualified immunity and certain damages issues.

(1999). To recover on a claim under the Texas Public Whistleblower Act a party must satisfy three elements. The party must show (1) a good faith report of a violation of law; (2) that the report was made to an appropriate law enforcement authority; and (3) show a suspension or termination of employment, or other adverse personnel action, as a result of the report. TEX. GOV'T CODE ANN. § 554.002(a) (Vernon Supp. 2000).

Under 42 U.S.C. § 1983 a transfer may, under certain circumstances, constitute an adverse employment action. Our case law is well-developed on the question of when a transfer may qualify as an adverse employment action. See, for example, Breaux v. City of Garland, 205 F.3d 150 (5th Cir.2000), cert. denied, ___ U.S. ___, 121 S.Ct. 52, 148 L.Ed.2d 21 (2000); Forsyth v. City of Dallas, 91 F.3d 769 (5th Cir.1996); Click v. Copeland, 970 F.2d 106 (5th Cir.1992). The Texas Public Whistleblower Act defines the term personnel action as including, inter alia, a transfer. TEX. GOV'T CODE ANN. § 554.001(3) (Vernon Supp. 2000). Therefore, a party may satisfy the third element of their claim by showing that they suffered an adverse transfer. However, the Texas courts have yet to set out under what circumstances a public employee's transfer can be considered adverse.

Both Serna and the City and Chief Philippus

argue that we should define adverse transfer for the purposes of the Texas Public Whistleblower Act by looking to our case law under 42 U.S.C. § 1983. That is, all the parties argue that we should define adverse transfer under the Texas Public Whistleblower Act in the same way as we define adverse personnel action under 42 U.S.C. § 1983. Thus, we will measure whether the evidence was sufficient to support the jury's verdict on both Serna's 42 U.S.C. § 1983 claims and his claim under the Texas Whistleblower Act by the standards we have developed under 42 U.S.C. § 1983.

A transfer, even without an accompanying cut in pay or other tangible benefits, may constitute an adverse employment action under 42 U.S.C. § 1983. However, it is insufficient for a plaintiff to show merely that he has been transferred from a job he likes to one that he considers less desirable. Rather, a plaintiff must produce enough evidence to allow a reasonable trier of fact to conclude that, when viewed objectively, the transfer caused harm to the plaintiff, "sufficiently serious to constitute a constitutional injury." Breaux, 205 F.3d at 152. Personnel actions that are commonly considered serious enough to inflict constitutional injury are discharges, demotions, refusals to hire, refusals to promote, and reprimands. Id. at 157; Pierce v. Texas Dep't. of Crim. Justice, Institutional Div., 37 F.3d 1146, 1149 (5th Cir.1994).

A plaintiff must establish that his transfer was equivalent to one of those actions to show that he has suffered an adverse personnel action. Brown v. Brody, 199 F.3d 446, 457 (D.C.Cir.1999); Harris, 168 F.3d at 221; Forsyth, 91 F.3d at 774; Click, 970 F.2d at 110. To put it somewhat differently, the plaintiff must show that he has suffered some serious, objective, and tangible harm as a result of his transfer. An important corollary to this rule is that the personal preferences and subjective perceptions of the plaintiff are insufficient to establish that his transfer inflicted a constitutional injury. Forsyth, 91 F.3d at 774.

V.

We now turn to the evidence presented at trial and whether it was sufficient to allow the jury to conclude that Serna's transfer from the Downtown Foot and Bike Patrol Unit to a patrol unit in another part of San Antonio was an adverse personnel action. We conclude that the evidence was not sufficient.

The plaintiff, Serna, and his fellow Officers O'Connor, Froelick, and Messer all testified that they considered the Downtown Foot and Bike Patrol Unit to be a prestigious assignment and that their opinion was generally shared within the San Antonio Police Department. R., Vol. 7 at 112, Vol. 8 at 422, Vol. 9 at 459, 489. For example, Officer O'Connor testified as follows,

Q. Do you consider the Downtown Foot and Bike

Patrol one of the more desirable assignments in the San Antonio Police Department?

A. Yes, sir.

Q. Is that pretty well acknowledged as one of the premier assignments in the police department generally?

A. Generally, yes, sir.

R., Vol. 7 at 112.

Chief Philippus also testified that he had once described the Downtown Foot and Bike Patrol Unit as the "best of the best." R., Vol. 9 at 745. Moreover, Officers Hester, Vasquez, and Middleton testified that they thought the tactics used by the Downtown Foot and Bike Patrol Unit made the unit more desirable than regular patrol assignments. Regular patrol units had to respond to disturbance calls as assigned by a dispatcher. They had little ability to seek out criminal activity and stop it on their own. The Downtown Foot and Bike Patrol Unit was more "proactive" in that officers were given more freedom to seek out and stop criminal activity on their own. R., Vol. 7 at 79, Vol. 12 at 1239, Vol. 13 at 1526. However, these officers also testified that their preference for the tactics of the Downtown Foot and Bike Patrol Unit was only a matter of personal preference.

Serna testified that Chief Philippus called him a "silent instigator" when he went to him to get some explanation for why he was transferred. R., Vol. 7 at

170. Serna also testified that this label followed him to his new assignment, and that this label would prevent him from ever being promoted in the department. R., Vol. 7 at 175. However, Serna produced no evidence confirming his belief that this label followed him. In particular, he never identified any officer who held this opinion in his new assignment. Nor did he identify any officer who thought any less of his abilities. In fact, every officer who testified to this issue at trial stated that they still thought of Serna as a good officer. Moreover, Serna testified that he had never taken a qualifying examination or other steps to seek a promotion. Indeed, Serna testified that he had not even sought a transfer out of the patrol unit to which he had been transferred. R., Vol. 8 at 339. Finally, Serna's testimony must be considered in light of Officer Odell Johnson's testimony. Johnson was also involuntarily transferred out of the Downtown Foot and Bike Patrol Unit after conflict with Griffin, but Johnson sought and won promotion to detective shortly after his transfer. R., Supplemental Vol. at 575.

Serna also testified that, as a result of his transfer, his pension would be substantially reduced as he would retire from the force as soon as he would qualify for a pension. However, such a reduction in his pension would result solely from Serna's desire to retire early. R., Vol. 8 at 353. No other evidence

tended to establish any obstacle to Serna's working to the usual retirement age.

The jury was entitled to believe that Serna felt tagged as a trouble maker and stigmatized as a result of his transfer and that he sincerely did not intend to work as long as he had previously intended, even though the City and Chief Philippus introduced evidence that no stigma was intended by the transfer. However, all Serna's testimony established was that he felt stigmatized and injured by his transfer. That is insufficient to prove that, viewed objectively, this transfer was an adverse personnel action.

In sum, all the evidence at trial tended to show was that the Downtown Foot and Bike Patrol Unit was more prestigious than other patrol units and that some officers preferred its tactics to those of other patrol units. There was no evidence to suggest that a transfer to a regular patrol unit was generally considered to be a demotion or any kind of punishment. Almost every officer who testified at trial testified that they had spent a substantial portion of their career in a regular patrol unit. Some in fact had spent their entire career in a regular patrol unit. Chief Philippus himself testified that he spent four years in a patrol unit before being promoted to detective. R., Vol. 9 at 735. Philippus also testified that most officers would work in a regular patrol unit for some part of their career, and Deputy Chief Richard Gleisner testified that most of the San

Antonio Police Department's uniformed officers worked in patrol units. Id.; R. Vol. 10 at 931. Serna can hardly argue that he suffered a constitutional injury when he was transferred to a duty all of his fellow officers performed for some part of their careers.

Serna's days off before he was transferred were Saturday and Sunday; for a short time immediately after his transfer, his days off were Wednesday and Thursday, but he was soon able to change them back to Saturday and Sunday. Serna's hours did change from a 6 pm to 2 am shift to a 10:30 pm to 6:30 am shift. However, nothing in the record shows that Serna was bothered by his new hours or that he attempted to get them changed, as he had with his days off. Serna never suffered a loss in pay or benefits, and he produced no objective evidence that his chances for promotion were reduced by his transfer. All the evidence established was that Serna was transferred from a unit considered prestigious and desirable to another unit on the force, one to which most of his fellow officers were assigned. That is insufficient to establish that Serna suffered an adverse employment action.

In only two cases have we previously held that a plaintiff who had been transferred without an accompanying cut in pay or benefits, or without an accompanying written reprimand, produced sufficient evidence that his transfer could be considered an

adverse personnel action by a reasonable trier of fact.[2] In each case the evidence was considerably more substantial than that in this case.

In Click we held that a reasonable trier of fact could conclude that the transfer of two sheriff's deputies from duty in the law enforcement section of the sheriff's office to duty as jail guards in the detention center was an adverse employment action. We did so based on several sources of evidence. First, the assistant director of the jail stated that "everybody" considered transfer from the jail to law enforcement to be a promotion. Second, the civil service director said that eight people appealed transfers from the law enforcement section to the jail, and only one the other way. Third, the Sheriff himself stated that all the jail guards would like to be transferred to the law enforcement section if they could. Fourth, and finally, we held that the two deputies lost certain seniority rights after their transfer. Click, 970 F.2d at 110. There is no evidence in this case that regular patrol assignments were considered punishment or even that they were considered less desirable generally. No one testified that officers were clamoring to get out of

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[2] The situation also arose in Sharp v. City of Houston, 164 F.3d 923 (5th Cir.1999). However, our review in that case was only for plain error.

regular patrol assignments. There was certainly no testimony, unlike in Click, from the Chief or any other senior officer that regular patrol was anything other than a good assignment.

In Forsyth, two detectives in the intelligence unit of the City of Dallas Police Department were transferred to night uniformed patrol after they exposed illegal wiretapping. We held that the evidence was sufficient for a jury to conclude that the two officers had suffered an adverse employment action. In particular, we concluded that the evidence tended to show that positions in the intelligence unit were more prestigious, had better working hours, and were more interesting than those in night uniformed patrol. The evidence also showed that other members of the department had been transferred to night uniformed patrol as punishment. Forsyth, 91 F.3d at 774. The factual distinctions between Forsyth and the instant case are clear. Nothing in the record shows that Serna has ever been bothered by his new working hours or that he has tried to have them changed. Though some officers did testify that they liked the tactics of the Downtown Foot and Bike Patrol Unit better than those of regular patrol units, that was only a matter of personal preference. Most importantly, Serna has not shown that transfers from the Downtown Foot and Bike Patrol to regular patrol were ordered as punishment, either for himself or for anyone else.

VI.

Because Serna produced insufficient evidence to establish that he suffered an adverse employment action as a result of his transfer, Serna may not recover on either his 42 U.S.C. § 1983 claims or his claims under the Texas Public Whistleblower Act. Accordingly, we REVERSE the judgment of the district court and RENDER judgment for the City and Chief Philippus.

REVERSED AND RENDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50775

U.S. Court of Appeals
F I L E D
May 3 2001
CHARLES R. FULBRUGE III
CLERK

ONOFRE SERNA
Plaintiff - Appellee

v.

CITY OF SAN ANTONIO; AL PHILIPPUS
Defendants - Appellants

- -

Appeals from the United States District Court for the Western District of Texas, San Antonio

- -

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 3/26/01, 5 Cir., _____, _____ F.3d _____)

Before JOLLY and DAVIS, Circuit Judges, and RESTANI*, Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.APP.P. and 5TH CIR.R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and majority of the judges who are in regular active service not having voted in favor, (FED.R.APP.P. and 5th CIR.R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court is active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ W. Eugene Davis
United States Circuit Judge

* Judge, U.S. Court of International Trade, sitting by designation.

REHG-4A

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

NO. 99-50775

IN THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

ONOFRE SERNA,

Plaintiff-Appellee

v.

THE CITY OF SAN ANTONIO AND
AL PHILIPPUS

Defendants-Appellants

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division

BRIEF FOR AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE ON BEHALF OF TEXAS EMPLOYMENT LAWYERS ASSOCIATION

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NO. 99-50775

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ONOFRE SERNA,

Plaintiff-Appellee

v.

THE CITY OF SAN ANTONIO AND AL PHILIPPUS

Defendants-Appellants

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Local Rule 29.2, the undersigned counsel of record certifies that the following listed organization has an interest in the outcome of this case.

Texas Employment Lawyers Association
Margie Harris, President
1007 Heights Boulevard
Houston, Texas 77008

There are no other interested parties other than those previously identified by the parties to this litigation.

MICHAEL LATIMER

NO. 99-50775

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ONOFRE SERNA,

Plaintiff-Appellee

v.

THE CITY OF SAN ANTONIO AND AL PHILIPPUS

Defendants-Appellants

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division

BRIEF FOR AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE ON BEHALF OF TEXAS EMPLOYMENT LAWYERS ASSOCIATION

STATEMENT OF CONSENT

In accordance with Rules 29(a) of the Federal Rules of Civil Procedure, the undersigned contacted all counsel for the interested parties in this litigation by letter on April 4, 2001 advising of TELA's desire to file its brief in this matter and requesting each sign the letter and return by facsimile prior to April 6, 2001, to indicate there was no opposition to the filing of an amicus curiae brief. As of the date of filing this brief, the only signature returned by facsimile is that of

counsel for Plaintiff-Appellee. Counsel for Defendants-Appellants have not responded.

_____

MICHAEL LATIMER

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NO. 99-50775

IN THE UNITED STATES COURT OF APPEALS
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ONOFRE SERNA,

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THE CITY OF SAN ANTONIO AND AL PHILIPPUS

Defendants-Appellants

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BRIEF FOR AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE ON BEHALF OF TEXAS EMPLOYMENT LAWYERS ASSOCIATION

INTEREST OF AMICUS CURIAE

The Texas Employment Lawyers Association (TELA) is a voluntary membership organization of Texas lawyers who regularly represent employees in labor, employment, and civil rights disputes. TELA members represent their clients in litigation throughout the state of Texas, and in the federal courts throughout the Fifth Circuit. Because the employment law established by this Court directly affects many (if not most) of its members' clients, TELA submits that its role as *amicus curiae* in

this case is appropriate.

TELA submits this amicus brief in support of the Plaintiff's Petition for Rehearing and Rehearing *en banc* to address two issues. First, the allowing of an untimely motion for judgment as a matter of law not only after the case was submitted to the jury, but during jury deliberations violated procedural and equitable principles of the jurisprudence of Rule 50. In addition, the panel opinion reflects that it failed to properly apply disregarded evidence favorable to Plaintiff; failed to draw all reasonable inferences in favor of Plaintiff; and failed to disregard all evidence favorable to Defendant that the jury was not required to believe. Such a ruling and analysis of the facts in evidence will substantially affect the rights of employees in this circuit because of a flawed application of the standard of review for a Rule 50 disposition and review under Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000).

The correct application of Reeves affects much of TELA's practice, TELA respectfully submits this *amicus* brief and urges the Court to reconsider its opinion; or in the alternative that the Court re-hear the case *en banc*.

ARGUMENT

A. The panel opinion wrongly concluded that the Defendant's motion for judgment of law was in compliance with Rule 50 of the Federal Rules of Civil Procedure.

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Rule 50 of the Federal Rules of Civil Procedure provides that a motion for judgment as a matter of law is to be made prior to submission of a case to jury. FED.R.CIV.P. 50(a)(2). Rule 50 further provides that the motion for judgment may be renewed at the close of all the evidence. Rule 50 further provides that if the court does not grant the motion as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may then renew its motion for judgment as a matter of law by filing a motion no later than ten days after entry of judgment. FED.R.CIV.P. 50(b).*** The mandate under rule 50 regarding the

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*** Defendant-Appellant describes the mandate of Rule 50(a) and 50(b) by "speaking in terms of moving before submission of a case to the jury" and "speaks in terms of making a motion for

timing of the motion is not as amorphus as the Defendant-Appellant would have this court believe. It is quite clear.

There are several purposes of Rule 50(b) and its timing requirement. One purpose is to avoid any question arising under the Seventh Amendment in regards that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. Montgomery Ward Co. v. Duncan, 311 U.S. 243 (1940). Further, a Rule 50(b) motion requires a defining of the appropriate issues posed by the post-verdict

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motion****. Another purpose is to allow the non-movant the opportunity to cure any evidentiary deficiencies that are raised properly by the motion, Merwine v. Board of Trustees, 754 F.2d 631 (5th Cir.) cert. den'd., 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed. 2d 62 (1985), thus avoiding an ambush to the nonmovant for the opportunity to make such a cure. Another purpose of Rule 50(b) is not to impute error to the trial judge for sharing the view that the evidence made a case for the

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judgment as a matter of law at the close of all the evidence." See Reply Brief of Appellant's, page 4.

**** Rule 50(b) Advisory Committee Notes.

jury when a litigant has not moved for motion for judgment as a matter of law at the close of all the evidence. Quinn v. Southwest Wood Products, 597 F.2d 1018, 1024 (5th Cir. 1979) (quoting Coughlin v. Capital Cement Co., 571 F.2d 290, 297 (5th Cir. 1978)). Noncompliance with Rule 50 results in a plain error standard of review for sufficiency of the evidence. McCann v. Tex. City Refining, Inc., 984 F.2d 667 (5th Cir. 1993).

It is accepted that this Court and other federal courts had been willing to excuse certain "*de minimis*" departures from technical compliance with Rule 50(b). Davis v. First Nat. Bank, 976 F.2d 944, 948 - 49 (5th Cir. 1992); Merwine v. Board of Trustees, 754 F.2d 631, 634 - 35 (5th Cir.) cert. den'd, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62 (1985); McCann v. Tex. City Refining, Inc., 984 F.2d 667 (5th Cir. 1993); Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018 (5th Cir. 1979); Alcatel v. DGI Technologies, Inc., 166 F.3d 772 (5th Cir. 1999).

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The panel opinion in the present case excused the noncompliance with the requirements of Rule 50(b), and concluded that the purposes of the rule had been satisfied principally relying on the Quinn (supra) case. However, there are significant procedural dissimilarities between Quinn and the present case. In Quinn, a motion for directed verdict was filed after the plaintiff's case. It was denied.

After the conclusion of all the evidence, the defendants objected to special interrogatories on specific grounds of evidentiary insufficiency. The trial court overruled the objections to the interrogatories. Argument had been made to the jury. The court's charge was also delivered to the jury. After argument and the delivery of the court's charge was given to the jury and after the jury had been retired, the defendants generally requested a directed verdict and objected to the submission of special interrogatories on sufficiency of the evidence grounds. This was pursued by the defendants before the jury was permitted to commence its deliberations.***** Quinn at 1026.

The Quinn court in essence ruled that under the circumstances of the raising the insufficiency question through objections to interrogatories to the jury prior to deliberations did preserve for appellate review the question of sufficiency of the

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evidence. The court specifically pointed out that the defendant's objections to the interrogatories on sufficiency of the evidence were stated clearly and specifically on the

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The record is clear that the objection to the interrogatories was before the jury commenced its deliberations because the trial judge sent the jury out with specific instructions to wait receipt of the form of the verdict before beginning to deliberate.

record before the jury began its deliberations. Quinn at 1026. It is clear from the court's opinion in Quinn that the objections to the charge were based upon sufficiency of the evidence and though it was done at a procedurally inconvenient time after argument and after delivery of the charge but prior to jury deliberations because of specific instructions to the court, the hour was not so late that the evidence could not have been reopened if plaintiff wished to add more. The court stated, "instead, he directed the jury to wait their disposition before going to work." Quinn at 1026.

In the present case, although the panel opinion believed that the case was procedurally similar in regards to the Rule 50(b) to the Quinn case, there are striking differences. In the present case, the Defendant-Appellant made a motion for judgment as a matter of law after the close of the Plaintiff's case. This motion was denied. The charge was read to the jury,
closing arguments were made and the jury was dismissed to begin its deliberations.****** The following day the city moved for judgment as a matter of law. (R.R.1795). The marked difference between the present case and the Quinn case is that in the present case the jury certainly began its deliberations and in the Quinn case they did not. The record was clear that the jury had not yet begun

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****** (R.R.1736 - 1783, 1795).

deliberations for the specific instructions of the trial court. Here the jury began deliberating on May 25 and continued on May 26. (R.R. 1783 - 1786, 1795).

This court's recent pronouncement on this issue in Alcatel v. DGI Technologies, Inc., 166 F.3d 772 (5th Cir. 1999) provides further support for the Plaintiff-Appellee's position that the Defendant-Appellant waived the sufficiency argument by not complying with Rule 50(b) and that there was not a *de minimis* violation of Rule 50(b). The Alcatel court said that the circumstances under which to identify a violation of Rule 50(b) as *de minimis* include: (1) The trial court's having reserved their ruling on an earlier motion for JML made at the closing of plaintiff's evidence. This requirement did not exist in the present case in that the trial court never reserved a ruling on an earlier motion for judgment as a matter of law. (2) The Alcatel court said that the defendant calling no more than two witnesses before closing is significant. In the present case, after the trial court denied the Defendant-Appellant's motion for judgment as a matter of law after the close of Plaintiff's case in chief, the Defendant called seventeen witnesses over the next six days and such testimony consumed over 215 pages in the record. This factor (the amount of testimony introduced by the defendant) was considered and applied in the McCann case in which the defendant failed to originally move

for directed verdict after the plaintiff's case, and took nearly one-third of a three-and-a-half-day trial. McCann, 984 F.2d at 671. The Alcatel court said that

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an elapse of only a small amount of time between the motion for judgment as a matter of law and the conclusion of all the evidence is considered. As stated above, the amount of time between the motion for judgment as a matter of law presented at the close of plaintiff's case and the conclusion of all the evidence was significant, six days of testimony. (3) The Alcatel court stated that the fact that the plaintiff introduced no rebuttal evidence is to be considered. This is the only criteria in which in the present case would be met under the Alcatel case analysis of *de minimis* violation of Rule 50(b). (4) Alcatel also noted that the district court reserved ruling on the defendant's motion for judgment as a matter of law at the conclusion of the plaintiff's case. In the present case, no such reservation of a ruling on a properly filed motion for judgment as a matter of law was made by the trial court.

As the Quinn court described, "there is much to be said for the view that whenever a party, at the conclusion of the evidence and before the jury has begun to deliberate, clearly points out a claimed evidentiary deficiency to court and counsel, not by way

of conversation or speculation, but on the record in an unambiguous formal motion for relief, however denominated, this should suffice." Quinn at 1025. Therefore, in the present case, the violation of Rule 50(b) by the Defendant-Appellant was not *de minimis* and violated the purposes of Rule 50(b) by being raised after significant testimony was presented by the Defendant and witnesses, after the jury

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arguments, after the court's charge was given to the jury and after deliberations began.

This analysis of *de minimis* departure from the technical compliance with Rule 50(b) was reaffirmed by the Fifth Circuit in Giles v. General Elec. Co., 2001 WL 266307 (5th Cir. 2001). In Giles the court said that the departure from the Rule 50(b) requirements was *de minimis* in regards to the postjudgment motion for judgment as a matter of law regarding the estoppel theory. Quoting that there was only one witness introduced by the defendant after the plaintiff's case and the court arguably reserved ruling on that issue when it was first raised after the close of the plaintiff's case when the court stated, "we'll see how we do on that" indicating a willingness to revisit the issue of estoppel at the close of all the evidence. Giles at 2001 WL 266307, 4.

B. By holding that there was insufficient evidence for the jury to find that Serna suffered an adverse employment action, the panel opinion misapplied the standard of review for sufficiency of the evidence as announced in the U.S. Supreme Court Reeves decision.

The standard of review for sufficiency of the evidence in employment-related cases has always been somewhat perplexing since the U.S. Supreme Court's decision in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Since that decision, there has been a conflict among the courts of appeals as

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to the analysis of Rule 50 and Rule 56 standard of review******

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Compare Kline v. TVA, 128 F.3d 337 (C.A.6 1997) (prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated); Combs v. Planation Patterns, 106 F.3d 1519 (C.A.11 1197), (same) cert. denied, 522 U.S. 1045, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (C.A.3 1996 (same) (en banc), cert. denied, 521 U.S. 1129, 117 S.Ct. 2532, 138 L.Ed2d 1031 (1997); Gaworski v. ITT Commercial

The Supreme Court clarified the analysis that is to be made for appellate review of Rule 50 and Rule 56 motions in determining the sufficiency of the evidence and to support a jury's verdict. The standard for evaluating a challenge to the sufficiency of the evidence announced in Reeves reaffirmed the standard (under Rule 50 and Rule 56) which requires a court to render judgment as a matter of law when a party has been fully heard on an issue, and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. Thus, the court must review all the evidence in the record, it must disregard

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Finance Corp., 17 F.3d 1104 (CA8) (same), cert. denied, 513 U.S. 946, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (C.A.7 1994) (same); Washington v. Garrett, 10 F.3d 1421 (C.A.9 1993) (same), *with* Aka v. Washington Hospital Center, 156 F.3d 1284 (C.A.D.C. 1998) (en banc) (plaintiff's discrediting of employer's explanation is entitled to considerable weight, such that plaintiff should not be routinely required to submit evidence over and above proof of pretext), and with Fisher v. Vassar College, 114 F.3d 1332 (C.A.2 1997) (en banc) (plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that real reason was discrimination) cert. denied, 522 U.S. 1975, 118 S.Ct. 851, 139 L.Ed.2d 752 (1998); Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (C.A.5 1996) (same); Theard v. Glaxo, Inc., 47 F.3d 676 (C.A.4 1995) (same); Woods v. Friction Materials, Inc., 30 F.3d 255 (CA1 1994) (same).

all evidence favorable to the moving party that the jury is not required to believe, drawing all reasonable inferences in favor of the

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nonmoving party but making no credibility determinations or weighing any evidence. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 2109-2112, 147 L.Ed2d 105 (2000).

Reeves provided an analytical frame work for determining whether or not there was sufficient evidence for a jury to decide on the ultimate issue of the case under Rule 50 and 56:

> "Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder could conclude the action was discriminatory. For instance, an employer would be entitled to a judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and it was abundant and

uncontroverted independent evidence that no discrimination had occurred."

Reeves at 2109.

In the present case, the panel opinion misapplied the standard of review by disregarding evidence favorable to the Plaintiff-Appellee. Reviewing the record of all the evidence presented, can it be argued that the panel considered all the evidence in the record and did not disregard evidence favorable to Plaintiff? It is submitted that the panel disregarded evidence favorable to Plaintiff that his involuntary transfer was an adverse personnel action.

As with any appeal from a grant of a summary judgment [or Rule 50 judgment

as a matter of law], a fact-intensive review of the record is necessary in order to discover the evidence and reasonable inferences therefrom in favor of the nonmovant's claims. Rubenstin v. Administrators of the Tulane Educational Fund, 218 F.3d 392, 399 (5th Cir. 2000).

Reviewing the record of all the evidence presented, can it be argued that the panel drew all reasonable inferences in favor of the Plaintiff-

Appellee? It is submitted that the panel failed to draw all reasonable inferences in favor of the Plaintiff-Appellee that his involuntary transfer was an adverse personnel action.*******

Under the analytical framework under Reeves, the court must disregard all evidence favorable to the moving party that the jury is not required to believe; that is, such evidence that is uncontradicted, unimpeached and comes from disinterested witnesses. This analytical process safeguards the integrity of the jury and ultimately the Seventh Amendment.

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The panel took some effort to describe that if Plaintiff did not want to remain in the patrol position during such hours that he ought to have sought a reassignment to a different shift or seek a promotion out of the position. The panel noted that another officer who was also transferred out of the DFU unit to patrol shortly thereafter sought a promotion and was promoted to detective. It is submitted that such evidence of efforts on behalf of the Plaintiff to extricate himself from the position is irrelevant to a determination whether or not the action itself was an adverse personnel action. To evaluate what action the victim took in response to the personnel action is essentially irrelevant to a determination of whether or not at the time that the decision was made it constituted an adverse personnel action.

The panel took this case away from the jury after the trial court evaluated the evidence and rejected the Defendant's claims that insufficient evidence was presented by the Plaintiff. The panel opinion took this case away from the jury after the jury heard the testimony, identified the facts of the case and the evidence presented by the parties and appropriately drew inferences which resulted in a verdict in favor of the Plaintiff. It appears clear from the panel's opinion that inferences that were properly drawn by the jury in favor of the Plaintiff's case were not drawn by the panel. This is exactly what the Reeves court cautioned against in regards to evaluating the evidence, the inferences to be drawn and the standard of review. It is for this reason the court in Reeves set forth the analysis in determining under what circumstances based upon the record whether or not a rational fact finder could conclude that sufficient evidence was presented to support the jury's verdict. Although the panel opinion acknowledged that the standard of review is what was described by the U.S. Supreme Court in Reeves, it cannot be reasonably concluded that this record conclusively reveals that there was no adverse employment decision or that there was uncontroverted independent evidence that there was no adverse employment decision which came from disinterested

parties. It is only under those circumstances utilizing the analysis of Reeves for a sufficiency review under Rule 50, that a court should only render judgment as a matter of law when that party has been fully heard on the issue and there is no legally sufficient evidentiary

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basis for a reasonable jury to find that plaintiff suffered an adverse personnel action.

Although the Defendant contested Serna's case, its evidence is not of such a magnitude that a reasonable jury could only find in the City's favor (i.e., that the involuntary transfer was not an adverse employment decision). All the Defendant has demonstrated is that they dispute Serna's characterization of the events and put forth evidence to support the City's position. The record reveals that Serna countered the City's arguments and created conflicts in substantial evidence. See Boeing Co. v. Shipman, 411 F.2d 365, 375 (5th Cir. 1969) (en banc). The jury had both conflicting versions before it and apparently did not find credible the Defendant's explanation that the involuntary transfer to night patrol in the worst part of the city was not an adverse personnel action. See Russell v. McKinney Hospital Venture, 235 F.3d 219, 225 (5th Cir. 2000). See also Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2110 (2000) (stating that courts are not required to give credence to evidence supporting defendants that is not uncontradicted and unimpeached); see also United States v.

Ramos-Garcia, 184 F.3d 463, 466 (5th Cir. 1999) (stating that the jury evidently did not believe the alternative explanation of the events and that the court would not second guess the jury in its choice); Woodhouse v. Magnolia Hospital, 92 F.3d 248, 254 (5th Cir. 1996) (the jury was presented conflicting evidence...and [apparently chose to believe that [age] was a criterium in the decision].).

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The jury, with its ability to listen to the testimony was in a better position to evaluate the credibility of the City's witnesses and as such, the reviewing court should not second guess the jury's rejection of the Defendant's proffered justification. See Reeves, 120 S.Ct. at 210. See also Vance v. Union Planters Corp., 209 F.3d 438, 443 (5th Cir. 2000) (stating that the court lacked the jury's opportunity to observe the witnesses demeanor and hear his voice and this fact contributed to the court's confidence in the jury's verdict.

CONCLUSION

The facts and inferences properly drawn, the evidence properly considered do not point so strongly and overwhelmingly in favor of the Defendant-Appellant that reasonable people in the exercise of impartial judgment could arrive at a contrary verdict; thus, for the panel opinion to attribute error to the trial court in denying a motion for judgment as a matter of law is incorrect.

Respectfully, the panel opinion is not consistent

with Reeves; accordingly, TELA urges this court to reconsider its opinion in light of Reeves; or in the alternative, TELA requests that the court grant *en banc* review.

Respectfully submitted,
MICHAEL LATIMER

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Supreme Court, U.S.
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No. 01-196

IN THE

Supreme Court of the United States

ONOFRE SERNA,

Petitioner,

v.

CITY OF SAN ANTONIO and AL PHILIPPUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Petitioner waived the issue whether a plaintiff must demonstrate, as part of a First Amendment retaliation claim pursuant to section 1983, that he suffered an adverse employment action because Petitioner raised the issue for the first time in his petition for writ of certiorari to this Court.

Whether the precedent of lower appellate courts, following this Court's holdings, have correctly inquired, in the context of First Amendment retaliation claims arising out of public employment, whether the plaintiff suffered an adverse personnel action.

Whether this Court's decision in *Reeves*, which merely reaffirmed the standard of review set forth in *Anderson v. Liberty Lobby*, requires a reviewing court to accept a plaintiff's speculation and subjective perception of harm as evidence of an adverse employment action, and whether the Fifth Circuit fully complied with *Reeves*'s directives.

Whether Petitioner has waived any argument regarding the adverse employment action analysis conducted by the Fifth Circuit, apart from its inclusion as an element in the first instance, and whether, in any event, the Fifth Circuit's analysis fulfills the constitutional aims of section 1983.

Whether Petitioner has waived any argument regarding the timing of Respondents' motion for judgment as a matter of law, made before the jury returned a verdict, and whether, in any event, Respondents' motion complied with the purposes of Rule 50 and was thus properly considered.

Whether the Fifth Circuit's judgment can and should be affirmed on any of a number of other legal grounds asserted by Respondents below.

LIST OF PARTIES

Respondents are satisfied with Petitioner's list of the parties and attorneys involved, with one exception. Since his appearance on behalf of Respondents below, Wallace B. Jefferson has been appointed as an associate justice to the Supreme Court of Texas and is no longer serving as Respondents' counsel.

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Respondents City of San Antonio and Al Philippus respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 244 F.3d 479 (5th Cir. 2001).

STATUTES INVOLVED

Petitioner asserts in his statement of jurisdiction that his claims were cognizable in the district court pursuant to 42 U.S.C. § 1681, *et seq.* for First Amendment violations. Petitioner also includes 42 U.S.C. § 1681 as one of the statutes involved. Respondents have been unable to locate such a provision, and Petitioner's complaint in the district court never raised a claim pursuant to this provision. (CR 4-12, 466-83) Petitioner also lists Texas Government Code § 554.002 as a relevant provision, but nowhere in his petition for writ of certiorari does Petitioner complain about the Fifth Circuit's ruling with respect to his state law whistleblower claim. Instead, his entire briefing focuses on the claim he asserted pursuant to 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Statement of Facts

1. Chief Philippus Has the Discretion to Transfer Law Enforcement Officers to Further Public Safety and Department Efficiency

This litigation arises out of the employment of Petitioner Onofre Serna by the San Antonio Police Department ("SAPD") and specifically concerns events that occurred in the Downtown Foot and Bike Patrol Unit ("DFU") in 1995 and 1996. Respondent Al Philippus is the Chief of Police for the SAPD, and he has held that position since 1995. (RR 798) As the Chief of Police, Philippus is given the discretion to transfer officers within the SAPD for the

betterment of the department. (RR 736-37; PX 2) This discretion is granted to Chief Philippus through the terms of the Collective Bargaining Agreement entered into between the City of San Antonio and the San Antonio Police Officers' Association. (RR 737; PX 2)

2. Conflicts Arose Within the Downtown Foot and Bike Patrol Unit, the Unit to which Officer Serna Had Been Assigned

Onofre Serna has been a member of the SAPD since 1985. (RR 140) In 1987, Serna was transferred to the DFU evening shift. (RR 141) At all times relevant to the lawsuit, the DFU was commanded by Captain Rudy Vernon and Lieutenant Harry Griffin. (RR 147, 243-44) The evening shift was supervised by Sergeant Tom White and Sergeant Hollis Hester. (RR 84-85, 92) The purpose and philosophy behind the DFU was to create a highly visible police presence in the downtown area to discourage crime and to create a safe environment for citizens and visitors to the downtown area. (RR 1331-32) A major policing concern was gang activity, which created problems in the form of violence among gang members, assaults on others, theft, robbery, public intoxication, and disorderly conduct. (RR 234, 1334)

Beginning in 1995, a subset of the DFU officers began complaining of Griffin's management style. (RR 80, 1531) Some officers disagreed with Griffin's policing philosophy; Griffin criticized officers' performance of their duties. (RR 1345-46, 1531, 1636) Griffin, for example, received complaints from local citizens and business owners that Officers Lockamy and Aguilar were not paying attention to their jobs and were, instead, socializing with women in the downtown area. (RR 1345-46, 1348-49) A few officers complained that Griffin made racial slurs and other inappropriate comments and that Griffin was cold and impersonal. (RR 115, 423, 462, 492-93)

In July 1995, four officers, (Aguilar, Lockamy, Vela, and Johnson), failed to come to Griffin's assistance during a juvenile disturbance. (RR 1350-51) After calling for assistance more than once, backup officers finally arrived. (RR 1351) As Griffin was walking back to his car, he noticed that Officers Lockamy and Aguilar were directly across the street from him but never came to his assistance, their excuse being that they did not think he was in trouble. (RR 1352-53) He also learned that Officers Johnson and Vela were on duty at the time but also did not come to his assistance. (RR 1353) All four officers were then placed on special assignment by Griffin and subsequently filed complaints with the EEO liaison, Officer Linda Taylor. (RR 1354-56; DX 1; PX 4, 5) Those EEO complaints alleged that Griffin was discriminating against the officers based upon their national origin. (PX 4, 5) Serna did not file any such complaint.

After the filing of the EEO complaints, a meeting was held on July 27, 1995 between the DFU patrol officers and Griffin to air grievances. (RR 1356) At the meeting, some of the officers complained about Griffin's policing philosophy and criticized the occurrence of practical jokes in the unit. (RR 544-45, 894-95, 997-98, 1626-27) After this meeting, the tensions in the DFU between officers and their supervisors continued to grow, coming to a head on the evening of May 28, 1996, when an alleged altercation occurred between another officer and Sergeant White. (RR 1361, 1367-68) These occurrences prompted Chief Philippus to take action.

3. Chief Philippus Created a Special Committee to Investigate the Conflict in the DFU

Chief Philippus created a blue ribbon committee ("the Committee") to investigate the DFU as a whole and expose any problems in the unit. (RR 769, 771, 821; PX 12) The Committee was headed by Deputy Chief Albert Ortiz.

(RR 769-70, 821; PX 12) Ortiz selected other members of the Committee based on their stellar reputations. (RR 855-56) The Committee did not focus its attention on any singular member of the DFU. (RR 822, 864, 1426, 1429, 1444, 1445, 1489, 1524-25, 1572, 1589-90, 1625) Instead, each officer of the DFU was questioned separately by a person of the next higher rank. (RR 862) The Committee asked questions of a general nature, seeking a broad picture of the problems in the DFU. (RR 863-64, 1427, 1431, 1488, 1490-92, 1522-23, 1572, 1589, 1626)

4. The Committee Concluded that Officer Serna Should Be Transferred Because He Was a Disruptive Presence in the DFU; the Transfer Was Not Based on Any Alleged Reports of Violations of Law

After completing the interviews, the Committee reconvened to discuss its findings and to make suggestions on a proposed course of remedial action. (RR 773, 826, 860) Chief Philippus did not meet with the committee members until after they had completed their investigation. (RR 824, 1440) The Committee found several management problems in the unit. (RR 775, 1432-36, 1493-96, 1525-26, 1574-76; PX 3; DX 10) The Committee found that Officers Lucio Aguilar and George Lockamy were viewed by many as having disruptive influences in the DFU, and that Serna had frequently encouraged their disruptive conduct. (RR 783-84, 1436-38, 1492-93, 1526-27; PX 3; DX 10) The Committee also noted that Serna's fellow officers specifically named him as a source of trouble at the DFU. (RR 783, 1436-39, 1492-93, 1496, 1526, 1527-29, 1599-1600; PX 3; DX 10) For example, those interviewed by the Committee stated that Serna used peer pressure to persuade other officers to bring down productivity and that he showed disrespect for his supervisors. (RR 1439, 1493, 1496, 1528) Many officers described Serna as encouraging

insubordination and behaving in an unprofessional and childlike manner. (RR 1174-77, 1191, 1193-94, 1229, 1238, 1247-50, 1284-87) The complaints made by Serna with respect to Griffin and overheard by other officers had nothing to do with alleged civil rights violations; Serna sounded like a disgruntled employee rather than a champion of civil rights. Based on these findings, the Committee determined that the transfer of Serna from the DFU would be in the best interest of the department. (RR 788-89, 1441, 1497, 1578-79, 1601) The Committee also recommended the transfer of several other officers, including Griffin, Aguilar, Lockamy, and Sergeant White. (RR 1441-42, 1447-48, 1497, 1558, 1601)

Based on these recommendations, Chief Philippus, under the authority granted by the Collective Bargaining Agreement, ordered the transfers. (RR 788-89, 826, 1325-26, 1451-52) Serna was transferred on July 3, 1996. (RR 163; DX 16; RE 17) Neither the recommendations of the Committee nor the action taken by Chief Philippus in transferring Serna was based on any alleged reports by Serna of violations of law or in retaliation for engaging in constitutionally-protected activity. (RR 788-89, 795-96, 826, 829, 848, 1445-46, 1450-51, 1482, 1497-1500, 1517-18, 1528, 1543-44, 1578, 1599-1601, 1632-33) Following his transfer, the Committee prepared a summary report of its findings. (PX 3; DX 10)

Serna filed a grievance with the San Antonio Police Officers' Association ("SAPOA") on July 24, 1996. (PX 18) Although the basis of this litigation is Serna's transfer, Serna had not, as of the time of trial, made a request for transfer from his current assignment. (RR 338-39) Following the transfers recommended by the Committee, the problems in the DFU subsided, and the unit began to run efficiently. (RR 829-30, 1451-52, 1580, 1633-34)

5. Petitioner Persists in His Quest to Try Lieutenant Griffin Rather Than Petitioner's Section 1983 Claim

Onofre Serna initiated this litigation claiming that he was retaliated against because he made reports of violations of law and for exercising his First Amendment rights of freedom of speech and freedom of association. (CR 4-12, 466-83) The majority of the testimony before the trial court, however, had nothing to do with Serna's claim of retaliation.

The testimony at trial centered on the following accusations: that Griffin had a different management style than his predecessors; that Griffin preferred the officers on the day shift; that the night shift felt like stepchildren; that Griffin referenced a Time magazine cover entitled "male, white and scared"; and that Griffin made racial slurs. (RR 79-81, 88-89, 91, 115) Other complaints focused on the policing philosophies of Griffin, that he referred to the night shift as lazy, that Griffin had favorites in the department, and that he made offensive remarks. (RR 378, 383, 386-87, 423-26, 462, 465) Some witnesses complained about Griffin's management style and personal experiences with Griffin. (RR 461-62, 581-87, 593-96, 588-93) One officer commented on Griffin's disparate treatment of the daylight shift and the evening shift and on the lieutenant's cold and impersonal nature, while another testified about problems in obtaining a lock for the women's locker room. (RR 462, 492-93, 673-76) The accusations against Griffin — that he encouraged the removal of gangs and the homeless from the downtown area — peppered and were interwoven with the overwhelming aim of the trial testimony, which was to air personal grievances against Griffin.

The great majority of the time spent questioning Chief Philippus concerned the same orders and instructions alleged to have been given by Griffin; questioning also focused on

the Chief's failure to investigate the allegations made against Griffin and whether the Chief was correct in his determination that the DFU was not performing its proactive function. (RR 759-69, 831-41, 850) Serna's questioning of Chief Philippus had nothing at all to do with his reasons for Serna's transfer.

Serna himself testified that his problems with Griffin stemmed, at least in part, from Griffin's "always coming down on us because he wanted us to produce numbers." (RR 223) Later, he testified that "we were the stepchildren of the Foot Patrol, our lieutenant at that time, which was Lieutenant Griffin, would do whatever he could to make our shift as uncomfortable as possible." (RR 247) Serna continued to complain about Griffin's comparing the day shift with the night shift and that he was "constantly on us." (RR 286-87) Other witnesses were questioned about their failure to investigate the allegations against Griffin, the manner in which they conducted the Blue Ribbon Committee's investigation, and about squabbles between Griffin and other officers. (RR 868-75, 905, 909-11, 917-20) The problems identified by the Committee were human relations problems and management issues within the DFU. (RR 1479, 1594-95)

Serna's witnesses provided no information relative to Serna, any complaints he may have made, or the reason for his transfer from the DFU. Witness after witness admitted that they had no personal knowledge why Serna was transferred and could not speak about any retaliation or any reports Serna may have made regarding violations of the law. (RR 387-89, 408, 412, 431-32, 483-85, 535, 546-47, 566-67, 666, 669, 704-05) Thus, Serna, contrary to trying any claims of retaliation against him in violation of either the Texas Whistleblower Act or the federal constitution, was attempting to have the jury rule on internal employment squabbles and the actions taken by Chief Philippus to deal

with them. There is no evidence that the Chief's decision to transfer Serna was precipitated by Serna's speech, his preclusion from associating with other officers, or his reporting illegal orders by superiors.

B. Proceedings Below

Petitioner filed suit in state district court against the City of San Antonio alleging a violation of the Texas Whistleblower statute. (CR 1-3) He alleged that the City retaliated against him by transferring him from the Downtown Foot and Bike Patrol Unit of the San Antonio Police Department for reporting alleged violations of law by Lieutenant Harry Griffin. (CR 4-12, 466-83) Petitioner later amended his state court petition to join Chief of Police Al Philippus in the suit and assert a cause of action for retaliation for the exercise of his First Amendment rights of free speech, freedom of association, and substantive due process. Respondents timely removed the case to federal court. (CR 1-12, 466-83) Petitioner also pled that Respondent Philippus deprived him of equal protection, due process rights, and state constitutional rights. (CR 4-12, 466-83) All claims but those based on the First Amendment and the Texas Whistleblower statute were disposed of by summary judgment. (CR 443-57)

Those claims proceeded to trial, and the jury returned a verdict for Petitioner. (CR 778-89) Prior to the rendition of the jury's verdict, Respondents made a motion for judgment as a matter of law, which the district court considered, expressly overruling Petitioner's claims of waiver. (RR 1795) The jury awarded Petitioner a total of $500,000, awarding an equal sum for the Whistleblower and First Amendment claims. (CR 778-89) The total award was later reduced by the district court to $475,000. (CR 779) Respondents timely filed their post-judgment motions, which were denied by the district court. (CR 822-37, 924-28, 1037-59, 1102)

Respondents then appealed to the United States Court of Appeals for the Fifth Circuit. (CR 1103-05, 1256-58, 1364-67) A three-judge panel of the Fifth Circuit reversed the trial court's judgment. The panel held that Petitioner failed to satisfy his burden in both his First Amendment claim and his state whistleblower action to establish that the government took an adverse employment action against him in retaliation for certain complaints and association with other officers. *Serna v. City of San Antonio*, 244 F.3d 479 (5th Cir. 2001). Petitioner filed a petition for rehearing and a petition for rehearing *en banc*, both of which were denied.

REASONS FOR DENYING THE WRIT

This Court should deny Serna's petition for writ of certiorari because: (1) Serna has waived any argument against the inclusion of an adverse personnel action as an element of his First Amendment retaliation claim under 42 U.S.C. § 1983 by raising it for the first time in this Court; (2) there is no conflict in decisional case law because all eleven federal circuit courts have determined that in order for a plaintiff to state a First Amendment retaliation claim pursuant to 42 U.S.C. § 1983, the plaintiff must demonstrate that he suffered a constitutional injury, *i.e.*, an adverse employment action; (3) there is no conflict with this Court's precedent because the decisions of lower appellate courts, including cases decided by the Fifth Circuit, were based on opinions from this Court cautioning that federal courts have no business monitoring a public employer's employment decisions absent injury to a constitutional degree; and (4) this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) was an affirmance of the standard of review as set forth in *Anderson v. Liberty Lobby*, which would not, contrary to Serna's representation, require a reviewing court to indulge and treat as evidence a complainant's subjective perception of harm.

1. Serna Has Waived Any Argument Regarding the Propriety of an Adverse Employment Element as Part of His Burden of Proof for a First Amendment Retaliation Claim Under 42 U.S.C. § 1983 by Raising It for the First Time to This Court

"This court sits as a court of review." *Duignan v. United States*, 274 U.S. 195, 200 (1927). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Id.* Neither in the district court nor in the Fifth Circuit did Petitioner complain about the inclusion of an adverse personnel element as part of his burden of proof, though the issue of whether Serna's lateral transfer constituted an adverse personnel action was briefed by both parties in both courts. *See id.* (refusing to review constitutional issue not raised in lower appellate court).[1] This Court has steadfastly adhered to this principle, including contexts where the new argument was being raised as an alternative ground for affirmance of the lower court's judgment. *See, e.g., United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) (same); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989) (same); *Heckler v. Campbell*, 461 U.S. 458, 469 n.12 (1983) (same); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 433-34 (1940); *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927) (same).

There is nothing exceptional about this case that would allow Petitioner to raise an issue for the first time in this Court, depriving the lower courts of an opportunity to review the issue and depriving Respondents of their opportunity to consider and counter the argument. Petitioner did not raise the issue in the district court, and the issue was never raised in the lower appellate court, though Serna briefed whether he suffered a

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1. In fact, as noted in the Fifth Circuit's decision, Serna argued that the lower appellate court should define adverse transfer for the purposes of the Texas Whistleblower statute by looking to its case law under 42 U.S.C. § 1983. *Serna*, 244 F.3d at 483.

constitutional injury with reference to existing Fifth Circuit precedent and the adverse employment action element. Even if this Court were to consider Petitioner's newly-asserted claim, *i.e.*, that he need show no adverse personnel action to recover under section 1983, his claim is without merit.

2. All Eleven Federal Circuit Courts, Based on this Court's Precedent, Have Held that in Order to State a First Amendment Retaliation Claim under 42 U.S.C. § 1983, the Complainant Must Demonstrate that He Suffered an Adverse Employment Action

Despite Serna's assertion of a conflict between the Fifth and other circuits regarding the inclusion of an adverse personnel action element in a First Amendment retaliation claim, all eleven federal circuit courts of appeals include this as an element in the plaintiff's burden of proof. *See, e.g., Figueroa-Serrano v. Ramos-Alverio*, 221 F.3d 1, 7 (1st Cir. 2000); *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 553 (2d Cir. 2001); *Fogarty v. Boles*, 121 F.3d 886, 888 (3d Cir. 1997); *Edwards v. City of Goldsboro*, 178 F.3d 231, 245-46 (4th Cir. 1999); *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir.), *cert. denied*, 531 U.S. 816 (2000); *Sowards v. Loudon County, Tenn.*, 203 F.3d 426, 431, 433 (6th Cir.), *cert. denied*, 531 U.S. 875 (2000); *Thomsen v. Romeis*, 198 F.3d 1022 (7th Cir. 2000)[2]; *Bechtel v. City of Belton, Missouri*, 250 F.3d 1157, 1162 (8th Cir. 2001); *Nunez v. City of Los Angeles*, 147 F.3d 867, 874-75 (9th Cir. 1998); *Withiam v.*

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2. The Seventh Circuit's approach has been somewhat split. *Compare McPhaul v. Board of Comm'rs of Madison County*, 226 F.3d 558, 566 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1358 (2001), *with Powers v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000) (appearing to reject adverse employment action element in section 1983 claim, though following with statement that action taken by government must be "sufficiently adverse to deter the exercise" of constitutional rights).

Baptist Health Care of Oklahoma, Inc., 98 F.3d 581, 583 (10th Cir. 1996); *Rogers v. Miller*, 57 F.3d 986, 992 (11th Cir. 1995).

The genesis of each holding can be traced back to the decisions of this Court in the context of First Amendment retaliation claims made by public employees, all of which involved, and some expressly acknowledged the need for, an adverse employment action. *See Waters v. Churchill*, 511 U.S. 661, 665-66 (1994) (involving *discharge* of government employee for allegedly criticizing hospital administration); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990) (expressing concern over employees being placed in "dead-end positions" with no opportunity for progress, which the Court explained would be adverse); *Rutan*, 497 U.S. at 99-100 (Scalia, J., dissenting) (referencing the requirement of an adverse employment action and citing to both *Pickering* and *Connick*); *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) (recognizing that First Amendment protects against "adverse personnel decision[s]"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job"); *Connick v. Myers*, 461 U.S. 138, 140, 142 (1983) (assistant district attorney *discharged* for circulating a questionnaire concerning internal office affairs; explaining that "state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression"); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 411-12 (1979) (teacher *dismissed* following conversations with principal); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) (action taken against the employee was a *decision not to rehire* him based on constitutionally-protected speech); *Perry v. Sindermann*, 408 U.S. 593, 595 (1972) (*nonrenewal of employment contract* alleged to be based on public criticism of college administration); *Pickering v. Board of Educ.*,

391 U.S. 563, 564, 572 (1968) (teacher *dismissed* for sending letter to local newspaper criticizing schools' past revenue proposals; "it is essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal").

Relying on footnote 8 in this Court's *Rutan* decision, Petitioner asserts that section 1983 provides a claim "even [for] an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." *Rutan*, 497 U.S. at 75 n.8. However, courts have come to terms with the statement in *Rutan* as dictum. For example, in *Colson v. Grohman*, 174 F.3d 498, 510-11 (5th Cir. 1999), the Fifth Circuit explained why this statement should not control. First, the Supreme Court was quoting the lower court in *Rutan*, which in turn was erroneously characterizing its own decision in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). Furthermore, the Fifth Circuit recognized that the body of the *Rutan* opinion stressed that the case before it involved "significant penalties . . . imposed for the exercise of rights guaranteed by the First Amendment." *Colson*, 174 F.3d at 511. Thus, the Fifth Circuit requires more than a trivial act to establish constitutional harm. *Id. See also Lybrook v. Members of Farmington Mun. Schs. Bd. of Educ.*, 232 F.3d 1334, 1340 (10th Cir. 2000) (explaining that *Rutan*'s footnote 8 has been interpreted as non-controlling dicta). Following Serna's lead, every unwanted glance would rise to a constitutional violation if based on what an employee said. *But see Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned").

Moreover, the decision in *Serna* echoes the concerns expressed by this Court against subjecting every decision made by a government employer to federal court scrutiny. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (explaining

that "public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions"); *Connick*, 461 U.S. at 143 ("government offices could not function if every employment decision became a constitutional matter"); *Bishop v. Wood*, 426 U.S. 341, 349 (1976) (federal courts are "not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies").

A major problem with Petitioner's argument is that, on the one hand he recognizes that *Pickering* requires government action that is sufficiently severe that it could be said to inhibit speech, while on the other he rejects an analysis that requires the government's action to be "adverse." If the action is not adverse, it does not have the potential to chill speech. In fact, Petitioner goes so far as to argue that *Pickering* and its progeny require only that courts determine whether the speech is of public concern and then whether the government's interests as employer outweigh the individual's interests. That analysis completely omits any requirement that speech be chilled. Petitioner also erroneously implies that the Fifth Circuit rejects the inclusion of transfers as potentially adverse employment actions. The circuit's precedent demonstrates otherwise. *See, e.g., Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992). Instead, the Fifth Circuit, acknowledging that transfers have the potential to chill speech, ultimately determined that Petitioner's transfer was not adverse as a matter of law, distinguishing its earlier decisions. Moreover, the "adverse personnel action" element is key to determining whether the employment action was intended to be punitive. *See, e.g., Pierce v. Texas Dep't of Criminal Justice*, 37 F.3d 1146, 1150 (5th Cir. 1994), *cert. denied*, 514 U.S. 1107 (1995). Finally, as explained below, Petitioner's request for review boils down, not to a wish that First Amendment law be reviewed generally, but to a desire

simply that his own transfer be deemed adverse. *See* Petition at 10-11 (discussing allegations confined to police departments) and at 16-17 (complaining that an earlier Fifth Circuit case held a transfer, "much less egregious" than his own to be adverse).

3. Serna Argues that the Fifth Circuit Failed to Properly Apply *Reeves*, Though His Ultimate Complaint Is That the Fifth Circuit Refused to Indulge in Speculation and to Base Its Decision on Serna's Subjective Perception of Harm

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000), this Court addressed the appropriate standard and scope of review in the context of Rule 50 motions for judgment as a matter of law and analogous Rule 56 motions for summary judgment. This Court held that an appellate court, in reviewing such motions, "should review all of the evidence in the record" and "must draw all reasonable inferences in favor of the nonmoving party," though the court "may not make credibility determinations or weigh the evidence." *Id.* "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151. "That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' " *Id.*

In setting forth this standard, the *Reeves* Court relied upon, and in fact quoted from, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986), and also cited the Fifth Circuit's decision in *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). Thus, contrary to Petitioner's implications, the standard of review in this context has been clear for many years and need not be reaffirmed again only

one year after *Reeves* was decided. Nor is the Fifth Circuit's partial quote from *Reeves* demonstrative of a misunderstanding or misapplication of the appropriate standard of review. In *Serna*, the Fifth Circuit quoted the critical portion of *Reeves*, and it need not have set forth the *Reeves* Court's entire discussion in order to stem an attack on its decision.

The only relevant inquiry is whether the Fifth Circuit properly applied *Reeves*, not whether it correctly quoted the standard, and the opinion demonstrates that the Fifth Circuit meticulously reviewed all of the evidence in the record giving credence to it where credence was due. Moreover, Petitioner's briefing of the review standard shows that it is he who misunderstands its application. Petitioner emphasized that part of the *Reeves* standard, explaining that an appellate court must give credence to the evidence favoring the moving party that is uncontradicted and unimpeached, *at least to the extent that that evidence comes from disinterested witnesses*. Petitioner understands this phrase to mean that only testimony from disinterested witnesses could be considered. However, the passage, by its express language, leaves open the possibility that uncontroverted testimony from an interested witness could be given credence. *Wilcox v. State Farm Mut. Auto. Ins. Co.*, 253 F.3d 1069, 1070-71 (8th Cir. 2001).

Petitioner also misconstrues case law regarding whether employees are considered interested witnesses for purposes of the *Reeves* standard of review. Neither *United States v. Bayer*, 331 U.S. 532 (1947), a criminal case, nor *Thurber Corp. v. Fairchild Motor Corp.*, 269 F.2d 841 (5th Cir. 1959), stand for the proposition that the testimony of an employee will be considered testimony of an interested witness, and thus discounted, in the context of the standard of review for a Rule 50 motion. Furthermore, in *Kuykendall v. United Gas Pipe Line Co.*, 208 F.2d 921, 923-24 (5th Cir. 1953),

the Fifth Circuit, relying on Texas and federal case law, held that the testimony of witnesses could not be disregarded by the jury simply because they were employees of the defendant. *Citing Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 394 (1933).

In any event, the only evidence offered by Petitioner to satisfy the adverse personnel action element was his own speculation and subjective perception. While the nonmovant in the context of a Rule 50 motion receives the benefit of all reasonable inferences that may be drawn from the evidence, "those inferences may not be based solely on speculation." *Clark v. Long*, 255 F.3d 555, 557 (8th Cir. 2001); *see also Intercity Maint. Co. v. Local 254, Service Employees Int'l. Union*, 241 F.3d 82, 86 (1st Cir.), *petition for cert. filed*, 70 U.S.L.W. 3036 (U.S. May 14, 2001) (No. 00-1764). Moreover, this Court and other circuit courts have consistently required a plaintiff to offer more than his subjective perception of harm as evidence of discrimination or retaliation. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive," is beyond the purview of the ADEA); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *Ramos v. Davis & Geck, Inc.*, 167 F.3d 727, 731 (1st Cir. 1999) (objective standard applies to determine whether constructive discharge occurred); *Garber v. New York City Police Dep't*, 159 F.3d 1346 (2d Cir. 1998) (unpublished) (subjective perception insufficient to establish claim pursuant to section 1983); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (refusing to allow plaintiff's subjective perception to control whether reassignment was materially adverse).

The objective evidence demonstrated that Petitioner received the same pay and benefits after the transfer that he had received before the transfer. (RR 1687-90) Thus, Petitioner's transfer was a lateral transfer, not a demotion. (RR 1642) In fact, Serna testified that "[t]he only different way that I was treated, sir, is that I was transferred involuntarily." (RR 333) Nothing negative regarding the transfer was ever placed in Serna's personnel file. (RR 826-27) He remained assigned to the same Central Substation. (RR 169, 186-87, 330-31) Although Serna offered opinion testimony that he was transferred to a "less prestigious" unit, others testified that this was not the case. (RR 1150, 1234, 1482, 1642) Serna even acknowledged that wanting to work in the downtown unit from which he was transferred was an individual preference. (RR 338) Serna conceded that he has never sought a transfer from his present assignment to another unit nor asked for a different shift. (RR 338-39, 341) Although Serna testified that he was labeled as a "silent instigator" and that this label followed him and prevented a promotion, Serna never identified any officer who held this opinion of him nor any officer who thought less of his abilities. (RR 170, 175, 415, 440, 517-18, 666-67, 719) The transfer had no effect on Serna's ability to promote, per the terms of the collective bargaining agreement. (RR 524-25, 828, 1703; PX 2) All record references characterizing Serna's transfer as adverse were to Serna's own testimony. (RR 166, 168, 169, 333, 337, 341)

A review of Petitioner's discussion of the evidence presented on this claim reveals that he wants a rehearing of what he has claimed elsewhere is an issue that must be decided on a case-by-case basis. This Court sits neither to give the defeated party in the lower appellate court another hearing, nor to resolve issues of importance to the individual litigants alone, but rather to decide cases "involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Rice v.*

Sioux City Mem'l. Park Cemetery, 349 U.S. 70, 73-75, 79 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). *See also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

Furthermore, Petitioner once again argues an issue he has not preserved. Nowhere in his issues presented does he challenge the adverse personnel standard employed by the Fifth Circuit, apart from its inclusion as an element in the first instance. Not only must an issue generally be raised below to preserve it for review by this Court, but a Petitioner must present the question for this Court's review in its petition for certiorari. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 510 U.S. 27, 28 (1993) ("In order to reach the merits of this case, we would have to address a question that was neither presented in the petition for certiorari nor fairly included in the one question that was presented. Because we will consider questions not raised in the petition only in the most exceptional cases, and because we conclude this is not such a case, we dismiss the writ of certiorari as improvidently granted"). As this Court recognized in *Izumi*, Supreme Court Rule 14.1(a) cautions that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." *Id.* at 30-31. "Faithful application will . . . inform those who seek review here that we continue to strongly 'disapprove the practice of smuggling additional questions into a case after we grant certiorari.' " *Id.* at 34. *See also Chandris, Inc. v. Latsis*, 515 U.S. 347, 353 n.* (1995) (same).

In any event, Petitioner presents no conflict requiring this Court's resolution. First, Petitioner asserts a conflict between the Fifth Circuit's decision in *Serna* and other Fifth Circuit case law, specifically *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999); *Southard v. Texas Bd. of Criminal*

Justice, 114 F.3d 539 (5th Cir. 1997); *Forsyth v. City of Dallas*, 91 F.3d 769 (5th Cir. 1996), *cert. denied*, 522 U.S. 816 (1997); *Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir.), *cert. denied*, 498 U.S. 940 (1990). This Court's jurisdiction does not extend to resolve the internal conflicts of a particular circuit court, *Davis v. United States*, 417 U.S. 333, 340 (1974), and, in any event, the Fifth Circuit meticulously detailed its decisions regarding this element of a section 1983 claim in the *Serna* decision itself. Petitioner also asserts that the decision in *Serna* conflicts with decisions from the Third and Seventh Circuits, namely *Hampton v. Borough of Tinton Falls Police Dep't*, 98 F.3d 107 (3d Cir. 1996) and *McGill v. Board of Educ.*, 602 F.2d 774 (7th Cir. 1979). However, this Court's review is confined to cases "where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne*, 261 U.S. at 393. *Serna*, *Hampton*, and *McGill* all agree on the governing legal principles, and distinctions can be made between the circumstances involved in each case. *Hampton*, 98 F.3d at 116; *McGill*, 602 F.2d at 779-80.

4. Serna Has Failed to Properly Raise an Issue Regarding the Timing of Respondents' Rule 50 Motion

Petitioner raises another argument in the body of his petition that he did not present in his questions to this Court. As a result, he has waived review. *Izumi*, 510 U.S. at 28. Moreover, Petitioner's one-paragraph reference to the timing of the Rule 50 motion, near the end of its petition for writ of certiorari, is wholly inadequate to raise the issue for this Court's review. *See Daniels v. Williams*, 474 U.S. 327, 341 n.17 (1986) (holding that state-action objection in one sentence constitutes nothing more than a bare reference, which is inadequate to mount a challenge). In any event, the Fifth Circuit explained that the purposes of Rule 50 were met where Respondents raised numerous challenges to the

sufficiency of the evidence and reasserted those challenges before the jury returned with a verdict, and also relied on the district court's express rejection of Petitioner's waiver argument. *Serna*, 244 F.3d at 481-82. There was no error. *See also Streber v. Hunter*, 221 F.3d 701, 721 (5th Cir. 2000); *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979).

5. Respondents Raised a Number of Other Grounds Below, Any One of Which Would Support the Fifth Circuit's Decision and Judgment

In the Fifth Circuit, Respondents raised a number of other legal bars to Petitioner's claims pursuant to section 1983, all of which would support the Fifth Circuit's judgment rendering judgment in favor of Respondents or, at the very least, a new trial. Among those arguments were that: (1) there was no decision by someone with final policymaking authority; (2) Petitioner did not speak on a matter of public concern; (3) Petitioner did not offer proof of a constitutionally-protected association; (4) Respondents' interest in promoting public service outweighed Petitioner's free speech and free association concerns; (5) no causal connection existed between Petitioner's transfer and any constitutionally-protected activity; (6) Chief Philippus was entitled to qualified immunity as a matter of law; and (7) Petitioner cannot recover a monetary award for the abstract value of a constitutional right.

A municipality may not be held vicariously liable for the actions of its employees in a suit brought under section 1983, but, rather, liability will attach only if an injury is caused in the execution of a local government's policy or custom. *Monell v. City Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). A single action by a municipal official can constitute the official policy of the municipality only if the municipal official possesses final

policymaking authority regarding the action in question. *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 784-85 (1997). Where top-level employees' decisions are subject to meaningful administrative review, their decisions are not final, and these employees are not considered to have final policymaking authority. *See, e.g., Hill v. Clifton*, 74 F.3d 1150, 1151 (11th Cir. 1996) (holding that where City Manager, rather than Police Chief, had final policymaking authority, there could be no liability because City Manager did not approve basis for Police Chief's actions). The collective bargaining agreement between the City of San Antonio and the San Antonio Police Officers' Association expressly states that the Chief's transfer of employees within the Department is subject to review by the City Manager. (PX 2 at 18) Thus, Chief Philippus did not have final policymaking authority, and, as a result, there can be no municipal liability under section 1983 for his decision to transfer Serna from the DFU.

Nor did Serna speak on a matter of public concern. *Connick*, 461 U.S. at 142. The catalyst for Serna's transfer was his reputation for insubordination and disruption of police protocol. (RR 1528) The content of Serna's alleged complaints were largely personal, made from the perspective of an employee dissatisfied with his employment situation. His apparent problem was not with Griffin's orders *per se*, but with the fact that they came from Griffin. Serna testified that he was trying to settle the dispute he had with his supervisors within his own unit. (RR 270) All of his alleged complaints were made during internal police department meetings or to fellow SAPD staff, and were private. His association claim also fails to the extent he has even presented that claim for review by this Court. The First Amendment does not protect professional friendships nor the right to associate with co-employees. *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) ("the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations

affecting the choice of one's fellow employees"). Moreover, Serna produced no evidence that he associated with other employees to discuss any alleged illegal activity within the department. *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (explaining that First Amendment preserves one's right to associate with others to pursue political and social ends).

The *Pickering* balancing test also weighs against Serna's claims. The SAPD's interest in promoting its public services outweighed any interest Officer Serna had in his speech. As explained above, Serna spoke on a matter of private concern wholly within the confines of his employment and in his capacity as an employee. Close working relationships are absolutely essential to the operation of the SAPD generally and the DFU specifically, as is demonstrated by the disruption caused by the breakdown in authority in the DFU. Serna was transferred because he was identified as a disruptive individual, encouraging insubordination in the DFU by fellow officers. This activity had the ability to impair discipline and harmony within the unit, and the evidence demonstrates that this, in fact, occurred.

Serna also failed to demonstrate a causal connection between his transfer and any constitutionally-protected activity. Serna claims to have complained to his supervisors beginning in 1993, though he was not transferred until 1996, more than three years later. (RR 210) With respect to the alleged July 1995 report, Serna acknowledged that he suffered no retaliation, even as he perceived it, until 1996. (RR 264-65) Serna admitted that he has no evidence that any of his complaints ever made their way to Chief Philippus or that anyone conspired to transfer him. (RR 296-97, 310-13) No one testified that retaliation was the reason for Serna's transfer, and many who testified made clear that they knew of no report by Serna of any illegal activity and that, in any event, they never communicated to Chief Philippus that Serna

had made a report of any illegal activity. (RR 102, 388-89, 407, 483, 700, 893-903, 911, 930-31, 933, 1001, 1024, 1369-70, 1372-73)

The members of the committee testified that Chief Philippus never targeted Serna, that the Committee never considered any report Serna allegedly made of illegal activity, and that the Committee recommended the transfers to alleviate the discord in the DFU; the transfers were not intended as punishment, and the recommendation to transfer Serna was not based upon any reports of violations of law made by Serna. (RR 1445-46, 1450-51, 1482, 1497-99, 1500, 1517-18, 1528, 1543-44, 1578, 1590-1601) Deputy Chief Ortiz, who headed the Committee, interviewed Captain Rudy Vernon. (RR 1625) During that interview, Captain Vernon never told him about any reports of violations of law made by Serna, and, in fact, Serna's name was never mentioned. (RR 1625-26) Ortiz also testified that there were no discussions during the committee meetings, including one with Chief Philippus, of Serna having made any reports of violations of law, and there was no discussion that Serna needed to be silenced or retaliated against. (RR 1632-33) The transfer was recommended in the interest of the department and was not intended as punishment. (RR 1633)

Additionally, numerous other officers, such as Officers Lynn, Vela and Froelick and Detective Mares testified that they made complaints similar to those Serna allegedly made but were never transferred. (RR 407, 414-18, 450, 516-17, 548-49, 567, 680-82, 701) Officer O'Connor testified that Serna was no more vocal about Griffin's orders than other officers who were not transferred out of the unit. (RR 134-35) Other officers testified that either they had no idea why Serna was transferred or affirmatively corroborated that the reason for Serna's transfer was his unprofessional conduct in encouraging disruptive behavior in the unit — conduct not at all related to alleged violations of citizens' civil rights. (RR 1025-26, 1174-77, 1191, 1193-94, 1229, 1238, 1247-50, 1284-87)

Based on the foregoing, Chief Philippus established that he acted in good faith as a matter of law and was entitled to qualified immunity as to all claims against him. The doctrine of qualified immunity provides that certain public officials who perform discretionary governmental functions should not be faced with civil rights litigation unless there is a showing that the official's conduct violated clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In the present case, there is no evidence to support a violation of any constitutional right. Furthermore, there is no evidence to support that any action taken by Chief Philippus violated any constitutional right of Serna, nor that Chief Philippus should have understood that the transfer of Serna would have violated any constitutional right. Chief Philippus was and is entitled to qualified immunity as to all claims against him as a matter of law.

Finally, damages based on the abstract value of constitutional rights are not a permissible element of compensatory damages in section 1983 cases. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986). The basic purpose of section 1983 is to compensate persons for actual injuries that are caused by deprivations of constitutional rights. *Id.* at 307. Because no compensatory damages can be awarded for constitutional violations in the absence of proof of actual injury, the abstract value of a constitutional right may not form the basis for section 1983 damages. *Id.* at 308. The special issues submitted to the jury asked only if Serna's rights were violated and for an amount of money to compensate him, without any reference to retaliation or elements of damage or injury. (CR 780, 782, 785, 787) As such, they allowed for an improper award of damages.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

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